87-1692

Supreme Court, U.S.
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In The
SUPREME COURT
of the
UNITED STATES

October Term, 1987

LEONARD J. MAROTTA,
Petitioner,
- vs -
UNITED STATES OF AMERICA,
Respondent.

On Petition for
Writ of Certiorari to the
United States Court of Appeals
for the
Federal Circuit, Washington,DC

PETITION FOR WRIT OF CERTIORARI

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LIST OF QUESTIONS

1. Was Article 3 of the Constitution violated by the U.S. Court of Appeals Federal Circuit when it decided that "sole issue... was credibility" and that it was "virtually unreviewable?"

2. Was Article 3 of the Constitution, as well as Articles 1 and 2, separating the Government into three branches of government, violated by the fact finder and the agency who expanded the meaning of Title VII when it defined sexual harassment in the work place as offensive conduct, thereby usurping the reponsibility of Congress?

3. Was Amendment IX of the Constitution violated by the agency and the fact finder by establishing a new meaning to the previously determined intent of Congress in removing offensive conduct from the working place between employees? Was Title VII intended to govern all aspects of behavior of Federal employees or was it only limited to employment related behavior between employees?

4. Was there an infringement into the domain of States Jurisprudence by the the adverse action of the agency against the appellant?

5.Why was Amendment VII of the Constitution guarantee of trail by jury not afforded the appellant at any stage of the appeals process? The appellant cost more than 20.00?

6. Was sexual harassment present in this action?

7. Were all the elements of sexual harassment present?

8. How could the appellant impede service to the public by means of the health care community, when the facility which was located in New Hyde Park, N.Y. serviced by the Mineola, N.Y. SSA District Office, could not be assigned to the appellant who worked in the Melville, N.Y. SSA District Office;and, thus would never service that facility as the M.S.P.R. determined by the misleading testimony of Mrs. Grossi?

9. When does misleading testimony become perjury? If Mrs, Grossi signed performance

discussions and evaluations which clearly enumerated the assigned service area of the appellant, at least to the facilities he had in his territory, how could she knowingly assess that the facility outside of the Melville, N.Y. be impeded? In this respect though slightly removed in the chain of command, Mr. Bussey would also be as aware of which office would be responsible for the Long Island Jewish-Hillside Hospital, New Hyde Park, N.Y., why did the U.S. Court of Appeals NOT see this contradiction between the physical evidence the appellant documented in the appendix of his brief? Did the Court abrogate its judicial review by relying on "virtually unreviewable?"

10. Was sexual nature ever documented, defined or even present in this case?

11. Why did the fact finder err by not using all the medical evidence available e.g. SSR83-17, SSA Disability listings, the ruling of the SSA OHA Administrative Law Judge who determined the SSI Beneficiary

met the Disability listings for a mental disorder? Does not a mental disorder impede functioning in all aspects of life, rather than in just the work environment? How else is medical evidence accumulated to reach this conclusion? Does not mental disorder place a greater burden on the fact finder to establish the state of mind of the accusor as part of "demeanor" observations? Do not the demeanor evaluations require the fact finder to evaluate the physical appearance of the witness? How could she miss that the witness, SSI beneficiary had rotten death, and her physical appearance reminded everyone present of the survivor of a NAZI Concentration Camp, she was so emaciated? This person testified that she moved her chair closer, or did she? She needed assistance to pick up the chair at the beginning of the hearing when her audable speaking voice was too low for the microphone and she was asked to move closer?

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12. Why did the Court ignore the implica-
of perjurous testimony of the Mrs. Grossi?
Does it not have some impact on the allega-
tions that the SSI beneficiary had to have
the identification of the individual she
was about to accuse of touching her leg
for 15 to 20 minutes? How much more of her
testimony had to be assisted in this manner?
When you couple this with the item of the
service area of the facility which was sup-
posed to have been impeded by the appellant
and which the Board made such an issue of
establishing that the health community
serviced by the appellant could not be
efficiently served? Why not I never visi-
ted that facility? Is it not a hyperbola
premise that creates an impedence of a
facility that is not servicable, thereby
convoluted logically?

13. How could the Court of Appeals ignore
the illegalities in sustaining the Board's
judgement? Was not due process and fair
and equal treatment principals violated?

14. Did Mr. Fulgieri violate the Amendment

IV of the Constitution by illegal search of the SSA records for the address of the SSI beneficiary on the telephone contact of March 21, 1986 request to Mrs. Grossi? The OIG is not listed in the Federal Register to receive data from SSA on a routine basis. Did he not have to conform to 42 U.S.C. § 3525 and request in writting what he wanted and quote the legal basis for his request of the data; and for what parpose it was being requested. Did he not have to submit that request to the head of the agency in charge of the records? Did this also violate the SS Act section 1106 on disclosure?

15. Did Mrs. Grossi also violate the SS Act section 1106 by release of the data without prior written consent on December 13, 1985 and March 21, 1986 as shown in the OIG File 2-85-01455-6? The privacy of the SSI beneficiary was invaded without prior written consent and resulted in a subpoena being issued to force her to appear to support the agency's case? VII

16. Did Mr. Len Tuzman violate 42 U.S.C.S 9501(h) when he released the contents of a conversation that was part of a routine visit of a social worker, Ms. Cheryl Lewis on November 25, 1985, and her SSI Client who was participating in the supportive living progam of the Long Island Jewish_ Hillside Hospital, and being diagnosed Disabled for a mental Disorder was protected by the aforementioned Statute which was in effect on December 12, 1985 when Mr. Tuzman telephoned Mrs. Grossi of SSA and released the data without prior written consent? How could he obtain such consent when he testified that he never met the SSI beneficiary until nine months later, the day of the hearing, September 4, 1986? Why did he say under oath that he considered the call to be a complaint, when on December 16, 1985 he notified Mrs. Grossi that he did not want the Special Agent to interview the SSI benificiary? Why did he on January 8, 1986 did he file a false report with Mr. Fulgieri of the OIG, stating

that the SSI benificiary was not available because she suffered a nervous breakdown and was hospitalized? The OIG record reveals that the SSI Beneficiary left the Supporting Program on December 31, 1985? The SSI beneficiary testified that she was not hospitalized nor did she suffer a nervous breakdown because Ms. Lewis her social worker testified that she left the Program of her own volition? Why then did she not file her own report? Why did she testify that she wanted nothing to do with anyone from The Long Island Jewish-Hillside hospital? The SSI beneficiary never said anything about the agency or the service provided by the government in anyway? Why did the Board establish the impedence when they took great pains to develop that they listened to the tapes? The copies of the M.S.P. record tapes were made on a borrowed private tape recorder and the quality wasn't as I would have liked. Is it not proper though to transcribe as much of the perttenate testimony as would apply to the issue?

17. Was it not significant that the Board ignored the implications of Slander and libel by Mr. Berzwieg's "recollections" were available to management staff during the decision and judgement process? Did not Mrs. Marie Baran's testimony refute those aspects of Mr. Bernzweig's "recollections" which enable all who read it to say it was a similar offence? If the similarities are established as erroneous by the uncontested testimony of this witness, then does it not follow that the illegal document, obtained in violation of the collective bargaining agreement, and as such in violation of 5 U.S.C. 71 et seq, now becomes libelous and as such constitute harmful error? How could the fact finder state the appellant failed to prove harmful error when it was her prejudicial denial of the testimony of Mr. Richard Kirchner from becoming part of the record after he was made available by the agency for that purpose for two days, was called, but the

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fact finder denied to swear him? Was not due process violated by this denial?

18. Was it a violation of due process and fair and equal treatment that the fact finder denied the expert testimony via the appellant's request for a supboena? It was necessary to serve the witness, Mrs. Dorothy Shuter in her capacity as an employee of the State of New York, Supervisor of Social workers admission and discharge building number 23, Kings Park Psy. Ctr. The fact finder ruled that the testimony was not relevant. How could she determine an eye-witness testimony as not relevant? Mrs. Shuter sat in on several interviews the appellant had with mentally disordered persons at the psychiatric hospital and could attest to the demeanor of the appellant with mentally disordered, the ability to deal with the confused mind and how on occassion an interview could be quite lengthy. Why was judicial rule 406 not afforded to the appellant by the factfinder to establish

a routine and habit of interviewing mentally disordered persons and thus evidence of credibility through this expert witness? Was the denial of the testimony by the fact finder of Mayor Vincent Suozzi the same violation of due process and fair and equal treatment because Mayor Suozzi was determined to not be relevant in the same manner? This witness made it a habit to come into the City of Glen Cove Council Chamber's and walk behind the screen unannounced? This served as a quality review and his testimony would comfirm the amount of interruptions and frequency of interruptions as a routine. How could the fact finder deny this witness without impeding due process? It is important that this fact be interpolated into a picture of what it is like on a Thursday morning when we arrived. The chamber had a group of people numbering up to 50 or 60 who have waited for us to arrive. When the interviews start it is usually after the screening operation has been done. Once the two

interviewers start to interview it becomes non-stop until lunch break. During the morning session the interviews and the interruptions are continuous. It is impossible to carry on an interview and try and recall the name and time a person interrupts you. How could the Board come to the conclusion that the interruptions were other than what I testified to as happening?

19. Was the fact finder biased and prejudiced by the OIG memorandum of January 29, 1986, with reference to the working the part time job and the"workman's compensation payments as was the agency? How could I violate a workman's compensation law when it was determined by the Hearings Officer of DOL that the law paying continuation of pay was not the same as the law paying workman's compensation? The strangest of all questions is that Social Security procedure for working while collecting benefits was applied to my case and management judged me to have misrepresented myself and or committed a fraud. How could

this erroneous concept of the DOL law and applying SSA procedure creates the onerous spector of slander and libel that gave management an obdurate fervor to prosecute the appellant for misconduct, and transfer him to another office, change his duty function in order to be ready to separate him as was planned in the April 10, 1986 memorandum of the Regional Commissioner Mr. Peter DiSturco, to the Regional Inspector General, Ms. Clive Franklin. How could the appellant receive a fair treatment and due process with the spector of "misrepresentation and/ or fraud as was written by the Ms. Shelley Albanese in her memo of June 9, 1986?

How could the fact finder not be influenced by the OIG memorandum of January 29, 1986, and not be prejudiced in the credibility findings against the appellant; the Court received the complete evidence of the aforementioned DOL Case#A2-547645 in Appendix E, of the Pro se petition for review ?

20. If the M.S.P.R. ruled "...we find that it is not necessary to determine whether sexual harassment extends to situations in which the alleged victim is not an employee because the agency also charged that the appellant's misconduct violated 45C.F.R. § 73.735-508(f) which states:

> Employees shall avoid any action whether or not specifically prohibited by this part, which might result in or create the appearance of:...(f) Affecting adversely the confidence of the public in the integrity of the Government."

does it mean that the journal actions in my personnel file which were a result of the Decision of June 24, 1986, are in error?

21. Was due process violated by the aforementioned Regulation because of it regulating any action which management determines "might result in or create the appearance of:.." as being too vague and too subjective in that it relies on the values of any manager or supervisor to be implemented?

22. Does this Regulation also violate the Constitution in that it provides for the

the agency to determine an act to be offensive, thus it infringes on the domain of Congress? We are not a nation of agencies, by agencies, for agencies!

23. Does it also violate Amendment IX of the Constitution in that it does not enumerate the specific act thus any act could be interpreted to be in contravention of the Regulation, 45C.F.R. § 73.735-508(f) or any part thereof?

24. Why did the Court of Appeals determine the sole issue were the fact finder's crediblity findings were "virtually unreviewable" , when the M.S.P.R. decision points out that the evidence does not support the administrative judges findings about the telephone calls of November 25, 1985?

25. Why did the Court state "virtually unreviewable" when the administrative judge saw a signature to the January 13 statement, authored by the Special Agent, Mr. Fulgieri, but the appellant did not sign it?

26. Why did the Court state "virtually unreviewable" when the fact finder ruled that the appellant intended to relitigate the reprimand after Mrs. Baran's testimony, and 24 hours before the appellant testified? How can intent be judged before the fact? In New York Jurisprudence on the acceptability of witness' testimony it is determined to be incompetant to have testimony on the intent of someone else. How do you know what someone else thinks before you actually hear him speak?

27. Why did the Court state "virtually unreviewable" when the fact finder's findings erred by interposing the appellant into the evaluation of the SSI beneficiary's psychiatrist's , Dr. Flieshman's note when the appellant was not the one being treated by the psychiatrist, nor ever met her?

28. Why did the Court state "virtually unreviewable" when the administrative judge titled Mr. Len Tuzman as a Medical Director, when his title is Assisstant Director of Social Workers of the Supportive Living

Program, not a Medical Degree but a Masters degree?

29. Why did the Court state "virtually unreviewable" when the administrative judge ruled that evidence was not relevant, thus denying the appellant a fair and equal treatment by prventing evidence of routine and habit as provided by Judicial Rule 406?

30. Why did the Court state "virtually unreviewable" when evidence of illegal practace was submitted to the M.S.P.R. as an exhibit of a sanatized record of the Inspector General's file #2-85-01455-6, which the M.S.P.R. ruled not to be an official record, but is the photocopied record sent to the appellant by Thomas D. Rosiewicz, Acting Administrative Officer, Office of Inspector General, received by the appellant on September 3, 1986, thus not enough time to digest for the hearing but ample enough time for the Appeal? This file number is the same number as appears on the agency evidence, why is it not acceptable for the appellant, but is the source

file from the OIG that copies of the agency evidence was obtained, and is acceptable for the agency?

31. Finally, if the record of the hearing is replete with with judgemental, and observational error by the administrative judge, why should the credibility findings be "virtually unreviewable" when the fact finder was prejudicially selecting the evidence, preventing evidence from being introduced that would strengthen the appellant's credibility, and ignoring medical resources such as SSR83-17, SSA Disibility Listings, and not even obtaining the SSA,OHA, Administrative Law Judge's Decision of the SSI beneficiary who was determined to be mentally disordered, approximately around the end of October, 1985 or early November, 1985; and which would have been more reputable evidence that the questionable note from the purse of the SSI beneficiary which stated an anorexic nervosa with depression did not suffer a thinking disorder, nor was dilu-

sional? This appears to contradict the diagnosis of an anorexic nervosa? The record of agency interference in the composition of evidence, namely the erroneous and slanderous nad libelous "recollections" of Mr. Bernzweig parallel certain allegations in the record of the OIG before the illegal contact on March 24, 1986 by Mr. Fulgieri? How much of this unsigned record was given to the SSI beneficiary to refresh her memory?

32. If the M.S.P.R. and the administrative judge in each of their independent reviews had listened to all of the tapes of the hearing of 4 and 5 September 1986, why were they blind to the implication that is drawn from the excessive loss of memory, and obvious misstatement of the events by Special Agent, Mr. Richard Fulgieri, especially in the context of opening and closing the OIG criminal file #2-85-01455-6 which would

by inference indicate that Mr. Fulgieri's lack of memory, that he assimilated the various agency statements of allegations previously in the file, along with the illegally obtained, and erroneously contrued "recollections" of Mr. Bernzweig, obtained on 13 January 1986 along with two unrelated personal documents of financial nature which were also removed by photocopy in violation of 45 C.F.R. 5b? Is it not possible that since the administrative judge found that the statement in substance of one SSI beneficiary was not her statement but Mr. Fulgieri's, it would be also possible for this to apply to the statement in substance of the other SSI beneficiary? In reality who composed the factors that eventually were supposed to be the SSI beneficiary's who was supboena'd based on illegally obtained data from the SSA SSI records?

33. How could service be impeded if a SSI beneficiary receives the highest rate possible based on the completed documentation of the accused appellant?

If the appellant submitted unchallanged evidence of a field representativ's responsibilities, and the normal routine of adjudication of SSI claims was followed in that two signatures would document the authorization of the SSI beneficiary's claim to cause the issuance of payment, where was the agency's evidence that supports the required element of intimidation under Title VII, if it applies in this case?

35. If the only persons the Melville N.Y. SSA District Office sent each week to the City of Glen Cove on Thursday were the three field representatives then assigned to the office, and generally Mr. Ivaney screened the quick interviews, and Mr. Saglimbeni generally interviewed the Title II beneficiaries, and Mrs. Grossi testified that of the three field representatives, Lenny was considered the better technician for Title XVI, SSI, what was so unusual about an SSI who would go to Glen Cove on Thursday to deal more frequently and most obviously with the person who interviewed

n, the appellant, Mr. Leonard J. Marotta?

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OPINION BELOW

The Court of Appeals entered its Memorendum decision affirming the Merit Systems Protection Board, No. NY07528610488, which sustained the decision of DHHS to suspend Leonard J.Marotta for 40 days, change his duty station causing him additional financial expense by imposing a greater travel to and from work; and finally, it changed the duty function in its Decision of 24 June 1986. The latter two actions were not enumerated in the proposal to Suspend for 40 Days Notice of 9 May 1986. A copy of the Memorandum is attached as Appendix A; the Tribunal Order has been copied and is attached as Appendix A; the Court denied petitioner's petition, pro se, for rehearing en banc on 21 January 1988. A copy of the order is attached as Appendix B. The Merit Systems Protection Board's initial decision dated November 14, 1986 is in Appendix C; the Merit Systems Proction Review was opinioned and ordered on July 2, 1987 and is in Appendix D.

JURISDICTION

On 9 December 1987, the Court of Appeals entered judgement affirming the suspension

transfer of duty station, and change of duty function against him. (App. A) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). 1/

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> Nor shall any person... be deprived of life, liberty or property without due process of law...

United States Constitution, Amendment IX:

> The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment VII:

> In suits at common law, where the value in contraversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise be re-examined in any court of the United States, than according to the rules of the common law.

1/ No other petitioner is involved in this petition.

STATEMENT OF THE CASE

On 9 December 1987, a panel of the Federal Circuit Court of Appeals affirmed the 40 day suspension, change of duty station which created a greater economic hardship by adding 16 miles per day in travel to and from work, and a change of duty function. The latter two items were not enumerated as part of the proposal to suspend of 9 May 1986, but were on the decision to suspend of 24 June 1986. Under Spring v. United States (1974, CA 4 W Va) 492 F2d 1053 these two items are punishments and as such are cruel treatment as neither were perscribed in the proposal to suspend, nor is any of these punishments set in a manner perscribed, but are arbitrary and capricious AS INVOLUNTARY TRANSFERS. This is because the punitive statements were invoked as penalties for an alleged misconduct by Leonard J. Marotta, against the misapprehanded DHHS, Standard of Conduct, Title 45, Code of Federal Regulations, Part 73, CFR 73.735; CFR 73.735-306; CFR 73.735-508 (f) which govern the acts of employees, between employees in a work envir-

onment in the first two codes, and in the last code misconduct was inherently improbable to occur. I could not impede service to an institution physically outside the service area of the Social Security District Office, Melville, N.Y. to which I was assigned. This was clearly evidenced by the appellant in his performance evaluations that were signed by the very person who stated I could not go to the institution. How could I go to an institution as a Field Representative when I was never assigned this facility, nor would ever be assigned to go to this facility which was in the service area of the Mineola, N.Y. district office? This was evidenced as part of the Merit Systems Protection Board docket No. 07528610488. The appeal rights as were enumerated in the Decision of 24 June 1986 did not provide for trial by jury as is provided in Amendment VII of the Constitution. At the time of the Decision of 24 June 1986, the Agency's evidence was solely based on hearsay evidence. This is clearly a violation of

of due process as this Court defined in Capobianco v. United States (394 Fed 2) 375.

On 23 December 1987, a petition for rehearing en banc was timely filed by the pro se petitioner, Leonard J. Marotta. The petition was denied on 21 January 1988 and the judgement was affirmed. The judgement stated: "The issue turns solely on the credibility of the witnesses, a matter that is 'virtually unreviewable' by an appellate tribunal, Hambach v. Dept of Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986). See Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

There was substantial evidence supporting the board's decision. The penalty imposed was not an abuse of discretion. 5 U.S.C. § 7703(c). The decision is affirmed."

Marbury v. Madison, Annals of Congress, 439 (1789) established judicial review in very clear terms - applying a reasonable assess-

ment of the facts. When James Madison spoke of the Constitution he described the warning: "The accumulation of all powers - legislative, executive and judiciary - may justly be pronounced the very definition of tyranny." The appellates judgement "virtually unreviewable" by an appellate tribunal results in the very thing that Madison warned us to be aware of and be on guard against "The accumulation of all powers...the very definition of tyranny." How can judicial review apply the precedent of Marbury v. Madison if the appellate tribunal ties its own hands, or blindfolds itself with the extremely narrow position of "virtually unreviewable"? This explains why the United States Court of Appeals for the Federal Circuit affirmed 97 % of the Merit Systems Protection Board Reviews in 1986. Without a reasonable review we allow the accumulation of powers of the Agencies to become oligarchical and tyrannical. What is reasonable assessment if virtually unreviewable allows no latitude of analysis.

The testimony of Mr. Alex Bussey, ARCFO, SSA, in the cross-examination reveals that we are all human. His testimony stated that we are not infallible. However, "virtually unreviewable" is the closest expression I have ever seen in print that approaches the without error syndrome that permeates throughout the Agencies policies and judgements. They truely believe that they are without error. St. Augustine's CITY OF GOD, Book XI, Chapter 16, we find an answer on how to make a reasonable assessment:

> "...a person who evaluates according to reason has far more freedom of choice than one who is driven by want or by passion. For, reason can see the gradation of things in an objective hierarchy of values, while necessity must consider them as a means to an end. Reason seeks for what seems true in the light of the intellect, while passion craves for what seems pleasant to the senses.
>
> So, too, in evaluating rational natures, the weight, so to speak, of will and love is so great that, although in the order of nature angels are higher than men, in the scale of morality good men outweigh bad angels."

The tribunal has turned from prior precedents that have uniformly held that "a pattern of offensive conduct must be proved." H.Finley

Downes v. FAA, 85-588, 18 October 1985. Furthermore, the courts have stated in Anthony v. Mazza v. U.S. Postal Service, 86-1958, 4 August, 1987:

> "...its role is only to decide if there is 'substantial evidence' that the alleged conduct occurred, even though some testimony may be 'conflicting' or 'taken out of context.'
> "Conflicting testimony must be expected in a proceeding involving a charge of sexual harassment. In most cases, the record is comprised solely of testimony by the employee charged with misconduct and the testimony by the harassed employee."

In both cases clear reference is made to an interaction between employees. Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Downes v. FAA 775 F2d 288 (1985) clearly enumerates explicit criteria that are necessary to be present to sustain a charge of sexual harassment. As in Downes v. FAA,"a necessary element of 'quid pro quo' harassment under Section 1604 -11(a)(2) - that there be a reward or penalty from the alleged harasser - is lacking." Title 45, Part 73, is briefly stated in substance on page 2 of the proposal to suspend dated May 9,1986. The

nature of the charge of sexual harassment demands a uniform criteria in order that Due Process and Equal Treatment Under The Law not be violated. Sexual Nature requires a clear, concise meaning. It can not have such a fluid definition that any circumstance, any allegation can be put foward to fit that meaning. The principle of Ex Post Facto would certainly be infringed upon under those rules. The evidence that the agency based its decision was totally hearsey, without substance, and in fact , was obtained by contravention to several statutes, e.g. 42 USCS § 9501(h) provides for the confidentiality of records of the individuals who suffer mental disorders. Agency evidence was based on the release of the communication between the SSI beneficiary and her Social Worker, Ms. Cheryl Lewis, who testified that the meeting was a routine visitation. No written consent was ever evidenced to establish that the SSI Beneficiary whose condition was established as a Disability meeting the SSA

CAMPANACCARO V HARRISON (1940, CA7 Ill) 114 F2d 400

Disability Listings, SSR 83-17, for a Mental Disorder based on Depression. This statute is part of the Bill of Rights for the Mentally Disordered and was in effect at the time of the 12 December 1985 telephonic communication from Mr. Len Tuzman, Ass't Director of Social Workers Supportive Living Program. Long-Island Jewish Hillside Hospital, Glen Oaks, N.Y., to Mrs. Gloria Grossi, Ass't District Manager, Melville, N.Y. Mrs. Grossi recorded that a "a formal complaint" was made by the SSI beneficiary. Absolutely no statement was ever produced to support this statement. None ever existed! In fact, the record of the Inspector General Office of Investigations, file number 2-85-0145 reveals that the SSI beneficiary never wanted to have this communication based on the routine visit of 25 November 1985, to be released, nor to be interviewed by the Special Agent. There is even evidence that a false report by Mr. Len Tuzman was made to prevent the Special Agent from visiting the SSI Beneficiary. The SSI Beneficiary testified that

she did not want to have anything to do with anyone from the Long Island Jewish-Hillside Hospital. OIG records reveal that she left the Supportive Living Program on 31 December 1985; however, Mr. Len Tuzman reported to the Special Agent on 8 January 1986, that the SSI beneficiary had suffered a nervous breakdown and was hospitalized two weeks earlier. He did not know what hospital! When the Special Agent visited the Long Island Jewish Hillside Hospital Supportive Living Program no "formal complaint was ever obtained, from Mr. Len Tuzman. What was obtained was the business card of Mr. Leonard J. Marotta, identifying him as an employee of the Social Security Administration. Much was made of the fact that Mr. Marotta had crossed out an archaic out of service telephone number and wrote the telephone number of the field unit. This was a direct line to the field unit, which by-passed the telephone operator of the Melville, N.Y. district office, but rang on one of three desks of the field rep-

representatives and the administrative assistant to the District Manager. It was not a private administrative line that Mrs. Grossi stated under oath. It did not ring in her office, nor in the District Manager's office. They had the private administrative lines, which also by-passed the switchboard. Neither she nor the District Manager could access the field representative's line from their desks. The ~~question was~~ Agency Implied that I was trying to imply that ~~I would be~~ the SSI beneficiary would only access me. The Agency stated that this was so because I also wrote the telephone number and days of the week and hours I could be reached at a private employment I worked at on my own time. The error the Agency made was that I never wrote this data. This SSI beneficiary did so in her own hand. Testimony of Miss Lewis, clearly establishes the origin of any sexual inference to be drawn from this data. She stated that this data was to suggest a meeting. No name of the place I worked at was ever given, nor was an address. The fact that it was a motel, and I was and still am

a desk clerk working at night has little meaning. How could I suggest a meeting if I never gave the name of the Motel, nor its location. I only gave the telephone number and when she could call if she wished to talk. This was at her request. I found this to be very curious, but it does not establish sexual nature. The agency also submitted evidence photocopied from the file of the Social Security file of this SSi beneficiary without her written consent, a document containing my hand written statement which was to evidence that I tried to call the SSI beneficiary on the morning of 25 November 1985. What the agency failed to note was that I had also given the general telephone number for the SSI beneficiary to call ON THIS DOCUMENT. No mention of this was made by the Agency, but the Agency made much of multiple telephonic contacts I admittedly made. Each contact I made was for a Supplemental Security Income purpose. The documents of any Social Security beneficiary, or Supplemental Security Income recipient are protected by the Privacy Act,

5 USCS 552b(7). The removal of this document without the written consent of the SSI beneficiary, for a reason which was not compatible with the purpose of provisions of the Social Security Act, Title II, XVI, XVIII, XIX, the Special Agent, violated this Act, and Amendment IV, of the Constitution. He even violated 42 USCS § 3525(b)(3) by not making a written request for this document, quoting appropriate authority for this document, and submitting same to the head of the Agency as prescribed by the aforementioned statute. The Inspector General, DHHS, is not listed in the Federal Register as an Agency to receive data from SSA on a routine basis. Therefore, the IG must request in writting citing proper authority, and submit this request to the head of the agency in charge of such a record. This is pursuant to 45 CFR 5b , 5 USCS 552b(7), and since no fraud nor progam abuse was involved in the investigation, 42 USCS 3523 (a)(b)(c)and (d) specifically enumerate these Duties and Responsibilities of the

DHHS, OIG. Section 42 USCS 3526 (a) transfered the functions of other offices and agencies that paragraph (3) become limited as follows:

> (3) such other offices or agencies, or functions, powers, or duties therof, as the Secretary may, with the consent of the Inspector General, determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act (42 USCS ss 3521 et seq; except that there shall not be transferred to the Inspector General under clause (3) program operating responsibilities.

Congressional intent for the aforementioned Duties and Responsibilities was not to tie up the OIG with administrative matters. Yet, this was done in this case. Why else did the Opening and Closing Memorandum of 29 January 1986 mention three possible results of their investigation, but "the office of investigations has terminated this investigation as there is no evidence of a criminal act." This appears in the OIG 27 February 1986 report to the Regional Commissioner, Mr. Peter Di Sturco, page 3.

The aforementioned false report by MR LENTHZMON was the culmination of a series of events that also causes the Special Agent to violate 5 USC 71 8 et seq; namely by the written request of 13 January 1986, requesting Mr. Bernzweig to to surrender a 10 January 1986 written report of his recollections of a reprimand that was expunged from the records of Mr. Leonard J. Marotta over three years earlier, and according to the collective bargaining agreement, National Agreement Between Social Security Administration and AFGE (AFL-CIO), dated 11 June 1982, should not be apart of a successive action if such action was beyond one year. The district manager maintains the extension file in his office. Since he composed the document on 10 January 1986, and he never notified this employee of the existence of the document 10 January 1986, he violated Article 3 Section 5, by not notifying the employee of the existence of the document. He also violated ~~24~~ 45 CFR 5b by not obtaining written consent from the employee for the release of said document, the NOTE FOR THE OTHER TWO NOT RELATED DOCUMENTS

contents of which where deliberately misleading and incorrectly established a similarity between the stale reprimand expunged from the file, according to appropriate agreement with Article 3, section 5 - SF-7B Extension File, (A),(B),(C), he violated (D) of this agreement when he surrendered the document on 13 January 1986 when he received the written request directly from the Special Agent who abused 42 USCS § 3525(b)(1), by not submitting his request to the head of the agency, (3) by violating Article 23, section 1, 4. When the testimony of Mrs. Marie Baran, the administrative assistant who typed the expunged document, is compared to the document of Mr. Albert Bernzweig it is clear that the latter is libelous; and since all Agency personnel AND JUDGE KIRKLAND referred to it as a similar event when comparing it to the allegations which were reported to HANA originating from the SSI beneficiary, who was not FROM BRIAN TUZMAN available due to the false report of a "nervous breakdown."

On 27 December 1985, the OIG file reveals that Mrs. Grossi was the one who revealed the existence of a prior reprimand for a "similar" incident. The question is how did she learn of the event when she was not a principle to the stale event. Her revellations that date also included the unrelated data of outside work activity, which was included in the OIG file, and also information about the workmans compensation allowance, which was brought out under cross-examination of Special Agent, Mr. Richard Fulgieri. It was his development of work activity and the workman's compensation involvement that presents the most insidious report. It is this Special Agents statement of the events that create the judgement in the minds of all who read his remarks of 29 January 1986, Opening and Closing Memorandum, that is best stated by quoting the so-called routine disclosure by Ms. Shelley Albanese to the US Dept. of Labor, New York District Office, Claim number A2-54645, on 9June 1986, 14 days before the Decision to Suspend of

24 June 1986, authored and sign=by Mr. Alex Bussey, ARCFO, New York Region, and Ms. Shelley Albanese immediate superior.

The important thought to remember that it is not the purpose of this Pro Se to get into a relitigation of the workman's compensation aspects, but to express to this Court that no one reading the following information could hold an individual who did what is alledged, to be credible.

June 9, 1986

United States Department of Labor
Office of Worker's Compensation Program
1515 Broadway
New York, N.Y. 10035

Attn: Alan Gilman
33rd Floor

Re: Leonard J. Marotta
File No. A02-547645

...The attached memorandum from his manager raises the possibility that Mr. Marotta was working at his night job at the Smithtown Motor Lodge during the period for which he had informed our agency that he was medically unable to work.

In connection with an allegation of improper conduct on the part of Mr. Marotta by a beneficiary collecting benefits from the Social Security Administration, the Office of the Inpsector General of the Department of Health and Human Services investigated her complaint....

We suggest that an investigation of potential misrepresentation and/or fraud by Mr. Marotta in his collection of Worker's Compensation benefits for a period during which it now appears he was able to work, be conducted by your OIG. If you are interested in obtaining a copy of the report of the investigation by the DHHS OIG you can contact Special Agent Richard Fulgieri, DHHS, OIG, 26 Federal Plaza, New York, N.Y. 10278....

Sincerely,

(signature)
Shelley Albanese
Chief, Employee Relations Section
Personnel Operations
Branch III, DHHS

The memorandum alluded to by Ms. Albanese as coming from "his manager" becomes a very curious document when it is viewed in its entirety. Though it is signed by Albert Bernzweig, its author is clearly Mrs. Gloria Grossi, as evidenced by the typist designation: "GG: lma" . The only employee who had those initials assigned to the Melville, N.Y. district office. The Nexus of slander and libel impacting on the judgements of the New York Regional Personnel is found in the 10 April 1986 Memorandum from the Regional

Commissioner, Mr. Peter Di Sturco, to the Regional Inspector General for Investigations, OIG:OI, Attention: Olive Franklin.

The opening statement is as follows:

> "Following a review of the subject file by Susan Pike and Bob Marincsak of my staff, it was felt that a number of items in file should be made part of the documentation used for the proposal to separate.(emphasis added) The following is a list of those items that my staff thought would be helpful:
>
> OI-3's
> 12/24/85 - Gloria Grossi
> 1/3/86 - Len Tuzman
> 1/13/86 - Leonard Marotta
> 1/13/86 - Voluntary statement(unsigned L. Marotta
> 1/13/86 - Advise and Consent Form
> 3/24/86 - Bonnie Bergstein
> 3/25/86 - Rebecca DeYoung
> 4/3/86 - Joseph Ivaney
>
> Serial #
> 5 - Photocopy of 2458 (see page 1 of this br
> 6 - Photo of Verification of Employment (Obtained without written consent o employee)
> 8 - 1/3/86 - Contact - Fisher
> 10 - 1/10/86- Albert Bernzweig Statement (see pages 16-17)
> 11 - 1/16/86- Memo- Contact with Ed Fisher
> 13 - OI-3 - Gloria Rossi(sic) 1/3/86
> 15 - OI-3 - Leonard Marotta - 1/15
> 16 - Opening and Closing Investigative Memo
> Business Card - Marotta's

This document establishes that the Opening and Closing OIG Memorandum ~~was an~~ RELIED UPON intergal impetus ~~to~~ FROM Mrs. Grossi's 12/24/85 inferences that a misrepresentation and/or fraud insinuations. On page three of that 29 January 1986 memorandum, the first of several such opening and closing documents, states the following:

> "...Further, MR. MAROTTA is currently receiving Federal Workman's Compensation benefits since 9/85. However, his ability to maintain his outside employment has not been affected.
>
> These issues will be referred to the Social Security Administration for any action they deem appropriate...."

The basic assumption made by Mrs. Grossi was that the rules that are applied to the disability provisions when someone works surreptitiously and receives Disibility benefits under provisions of the Social Security Act would be identical to provisions governing work under 15 USCS § 8118. This misapprehension clouded judgement and affected the credibility finding by inference. Anyone who read the Opening and Closing Memorandum quoted above, would

certainly have reason to doubt the word of a person who worked while receiving workman's compensation benefits. On 10 August 1987, Leonard J. Marotta received the following Compensation Order vacating prior Decision Number: A2-547645. Page 5 of this Order states the following:

> "...In summary, the record establishes that the claiment long held concurrent employment in the private sector, which did not conflict with his Federal employment in terms of time, mental strain, or physical exertion. The record establishes that he sustained an employment injury, which disabled him from the duties of his Federal employment position. The record also establishes that he was able, however, to continue his private sector employment and that he did lose at least some time from his private sector employment because of the federal employment injury. Under these circumstances and events prevalent in this case, it must hereby be held that neither the Act nor the regulations contain any language nor permit any construction so as to exclude the claimant in this case from traumatic injury wage continuation benefits from August 30, 1985 through September 29, 1985. There is no basis in the law, policy, precedent, or procedure which may serve as a basis for the District Office decision of June 11, 1987.
> Therefore, that decision must be, and hereby is, reversed.

DATED AUG 10 1987
WASHINGTON, D,C.

(signature)

WILLIAM A.USHER
Hearing Representative
for
Director, Office of
Workers' Compensation
Programs

The provisions of 18 USCS § 3500 apply in noncriminal proceedings such as administrative hearings where fundamentals of due process and fair play must be followed. Saunders v. District od Columbus (1970, Dis Col App) 263 A2d 58. Matter is deemed scandalous when it improperly casts derogatory light on someone, usually party to action. Martin v.Hunt (1961, DC Mass) 28 FRD 35, 5 FR Serv 2d 27; Eli Lilly & Co. (1972, DC Puerto Rico) 56 FRD 116, 16 FR Serv 2d 1096. On the subject of harmful error, Judge Kirkland's assesment of the appellant's chance to establish his innocence as "however slim, of avoiding discipline." If I am innocent of the charge, why would Judge Kirkland state the chances of avoiding discipline as "however slim"? If

she had read the Opening and Closing Memorandum of 29 January 1986, then the inference is clearly a reference to another matter. The only other matter under consideration and so much a part of the investigation is the false, and slanderous reference to misrepresentation in the Workman's Compensation Case. Why else would she deny me expert witnesses to establish aspects of my testimony as habit and routine? In civil rights actions against police officers for the shooting death which occurred while they were attempting to obtain information concerning traffic accident had been involved, evidence of decedent's previous violent encounters with police officers was admissable as evidence of habit, since there was adequate testimony to establish that the decedent invariably reacted with extreme violence to any contact with uniformed police officer. Perrin v. Anderson(1986, CA10 Okla) 784 F2d 1040. Judge Kirkland denied the petitioner's

request to have the MSPB issue a subpoena was denied on 13 August 1986 based on her not finding ~~of~~: "her proposed testimony to be relevant and material..." Ms. Dorothy Shuter would have served as an eye-witness to the petitioner's demeanor in interviewing Mentally Disordered SSI applicants and/or recipients being released from the Kings Park Psychiatric Hospital. She was and is a Supervisor of Social Workers at that facility. She also sat in on several interviews that the petitioner had as a routine every Tuesday during the period of June 1984 through June 1986. The same reason was given for denying Mayor Vincent Suozzi of the City of Glen Cove. It was at his Council Chambers that the alleged incident ocurred. He often made unnanounced visits to/ these Chambers, and interrupted the Social Security Representatives, or by walking behind the podium screen. This testimony would have established the routine that was testified to have been a matter of course every Thursday. Thus the petitioner was denied the opportunity to

establish a routine as provided for under Rule 406, Federal Rules of Evidence. O'Brien v Papa Gino's of America, Inc.(1986, CA1 NH) 780 F2d 1067, 121 BNA LRRM 2331; Mobil Oil Corp. v Federal Power Com.(1973) 157 App DC 235, 483 F2d 1238. In O'Brien v Papa Gino's of America , Inc. evidence that 2 former employees had been asked to take polygraph examinations in connection with suspected drug use and employee theft tends to establish that employer had regular practice of asking employees to take polygraph examinations. In the Mobil Oil Corp. v Federal Power Com. parties interested in outcome of administrative proceedings must be given opportunity to present evidence and to criticize opposing evidence. The testimony of Mr. Len Tuzman and Ms. Cheryl Lewis under subpoena was in dirct contravention of 42 USCS § 9501(h) which provides for the confidentiality of psychiatric records, and also requires written consent for any release of same. No written consent was ever

documented as is required. This could also constitute a violation of 5 USCS § 552b(7) since the records were of an SSI beneficiary in a Supportive Living Program, that is provided for in the Bill of Rights for the the Mentally Disordered. The Social Security Act, 42 USC 1305, Sec.1106,DISCLOSURE OF INFORMATION IN POSSESSION OF AGENCY, states in pertinent part: '...

> "... of any file, record, report, or any information, obtained at any time by the Secretary or by any officer or employee of the Department of Health and Human Services in the course of discharging the duties of the Secretary under this Act, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary or from any officer or employee of the Department of Health and Human Services shall be made except as the Secretary may by regulations prescribe and except as otherwise provided by Federal law. Any person who shall violate any provision of this section shall be deemed guilty of a misdemeaner and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both.

Section 1106 above is cross-refered to 5 USC 552(b)(3) which provides for the following procedure:

"Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(a)(7) the term "routine use" means with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the the purpose for which it was collected.

Section (e)(4)(D) provides for the agency to publish a list of agencies that data collected would be disclosed for routine use. Accordingly, the aforementioned letter from Ms. Shelley Albanese statement that her letter to the Department of Labor of 9 June 1986 contained data that was not compatible with that agency's administration of a workman's compensation matter. Disclosure of part-time work activity meets that definition, but disclosure of information about the"allegations of a "improper conduct on the part of Mr. Marotta by a beneficiary collecting benefits

from the Social Security Administration, the Office of the Inspector General of the Department of Health & Human Services investigated her complaint...." No written consent was ever obtained from me to the release of this data from my personnel file! Nor was any prior written request ever obtained from the Department of Labor to the Head of the SSA requesting that this data be released, citing legal authority as required by statute. I was never informed of its release as is required by statute, 5 USCS § 552(e)(8) and (10):

> (8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;
>
> (10) establish appropriate administrative, technical, and physical safeguards to insure the security and the confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarassment, or unfairness to any individual on whom information is maintained;...

The Inspector General of DHHS is not listed in the Federal Register for routine use dis-

closure. Pursuant to the aforementioned statutes, 5 USCS 552, 552a,b, et seq, prior writtten consent was needed for the release of any information about the SSI Beneficiary, or any data from her file could be accessed and or copied for any purpose not compatible with the Provisions of the Social Security Act, which was previously enumerated.

Therefore, Mrs. Grossi violated the Privacy Act on 13 December 1985 by revealing information by telephone to the Office of Investigations, Inspector General, without prior written consent of the SSI beneficiary. No evidence of same was ever documented, as there was never a "formal complaint" by the SSI Beneficiary. Mrs. Grossi testified to the fact that she never met the SSI Benefiary prior to the date of the MSPB hearing 4 September 1986, when she pointed out to the SSI Beneficiary which one of the four men entering the outer hall of the MSPB was Mr. Marotta, She went so far as to state he was a little different because he shaved his mustache off. Sworn affidavits to this

conversation were submitted to the Review Board, MSPB. The question is now asked, how could the Review Board sustain the fact finder's judgement in this context?

Two more violations of the Privacy Act are documented in the Office of Investigation File: one occurred when Mr. Fulgieri was asked by Ms. Olive Franklin to contact the SSI Beneficiary to obtain her statement.

OIG file# 2-85 01455-6-19:

"S.A. spoke to A.R.I.G.I. Arigi advised S.A. that the Social Security Administration requested that O.I. interview Bonnie Bergstein. Ms. Bergstein who is subjects accuser was not available for interview at the time case was closed. S.A. will contact Bergstein and interview her if possible." This file is recorded by SA Fulgieri on 11 March 1986. This file identifies the mode of communication as contact.

OIG file#2-85-01455-6-20 (sanatized by IG)

> "Contacted Gloria Grossi ADM Melville Social Security Office. Ms Grossi Advised that S.S.A. records reveal that Bonnie Bergstein recently changed her address on S.S.A records to XXXXXXXXXXXXXXXXXXXXXX NY

This file identifies the mode of communication as Telecon, and is recorded from SA Fulgieri dated 21 March 1986. This is a clearly unwarranted invasion of privacy of the SSI Beneficiary without prior written consent from the SSI benefiary. This also, occurs to another SSI Beneficiary on 24 March 1986. OIG file# 2-85-01455-6-23 dated the same date. Mode of communication is contact.

> "Contacted Gloria Grossi, ADM Melville, SSA DO Rebecca De Young is a Supplemental Security beneficiary. She resides at XXXXXXXXXCXXXXXXXXXX N.Y. The Melville Office had a redetermination file on Ms. DeYoung. Leonard Marotta conducted and interview with Ms. De Young in March, 1986"

The knowledge of the second SSI beneciary's involvement was obtained by a visit to the first SSI Benefiary's residence on 24 March 1986, again without prior notification, nor with her consent. The results of this meeting became part of the OIG file #2-85-01455-6-24. This was clearly an invasion of her privacy. The same circumstance occurs to the other SSI Beneficiary, who subsequently became a patient at a Psychiatric facility. The

invasion of her privacy caused her deterioration of her mental state! Why should this action be condoned and permitted to go without due consideration for the appropriate violations of the Bill of Rights of the Mentally Disordered, and the Privacy Act. The address obtained from the SSA records via telephonic contact was on the bottom of OIG file # 2-85-01455-6-24. It was this record that Mr. Peter DiSturco requested to be included in his 10 April 1986 memorandum to document a proposal to "separate". Thus the address was obtained from the IG to be later given to the MSPB to issue a subpoena to the SSI Beneficiary, coercing her to give testimony at the MSPB hearing. This was done by an August 8, 1986 motion received in the Board's New York office, by which "the agency moved for issuance of three subpoenas to compel appearances of Mr. Leonard Tuzman, Ms. Cheryl Lewis, and Ms. Bonnie Bergstein to testify at the above-captioned appeal."... This motion by the agency was illegal because of the Poison

Tree doctrine of evidence. The most remarkable circumstance is that the obdurate actions of the personnel involved caused each person who passed the SSA information which was released without the consent of the SSI beneficiary, to be equally subject to the penalties of the Privacy Act, and the provision for confidentiality that is enumerated in the Social Security Act; section 1106; 5 USCS § 552b(7)(C). The access to the Social Security Records ~~were~~ are clearly not for a compatible purpose. Written consent was a requirement, it was not obtained. There was no appropriate prior request by the SA Mr. Fulgieri who used such a written request to obtain and expunged stale reprimand, thus he knew of the procedure, and what to do. He did not do it. Shaver v Bell (1977, ND Ga) 433 F Supp 438; SSR 82-42 (July 1982); Pinkett v United States (1952, DC Md) 105 F Supp 67; Re Lennon (1974) Bd Imm App File A17 595 321, NY; 35 AdL2d 250; Gelbard v United States (1972) 408 US 41, 33 L Ed 2d 179, 92 S Ct 2357.

The most significant fact that should be brought to the attention of this Court is that the OIG closed the case three separate times. The first time was 29 January 1986. The second time was On 27 February 1986. The third time occured on 3 April 1986. It is the final closing that has the only reference to the confidentiality of the data. The following appears on page 2 as a warning:

> This report is the property of the Office of Investigations and is loaned to your agency, it and its contents may not not be reproduced without written permission. The report is FOR OFFICIAL USE ONLY and its disclosure to unauthorized persons is prohibited. Public availability to be determined under 5 U.S.C. 552.

There is no evidnece of written permission from any of the individuals ever being obtained. If permission in written form was available and present then why were no signatures on any of the statements reported to be from the SSI Beneficiaries? Why was it necessary to subpoena the supposedly injured party who supposedly issued a "formal complaint" as reported by Mrs. Grossi? Why

was it necessary for Mrs Grossi to access the confidential data contained in the Social Security Records, protected by Section 1106 of the Social Security Act, to obtain the address of the SSI beneficiary, and release this address without first getting written permission of that SSI beneficiary? The use of that data is perscribed by law. The Inspector General is not listed in the DHHS Federal Register as an agency that would get data as a Routine of the IG. The IG can access the records with a written request that enumerates the legal basis of the request. Permission could only be given by the head of the Agency, not Mrs. Grossi via telephonic reply. It is clear that violations of the 5 U.S.C. 552 did occur, and the violators of the Privacy Act provision and AMENDMENT IV OF THE CONSTITUTION was my accuser in the agency, Mrs. Gloria Grossi. To date she has not been arrested , nor charged with this violation as perscribed by law.

The act of photocopying a document is no less an invasion of privacy than to remove it physically from a specific location. Their was no criminal act involved that would be evidenced, but it did contain data that was protected by Section 1106 of the Social Security Act. Thus protected by 5 USCS 552(b)(7)(C) as an unwarranted invasion of personal privacy. The document in question was Form 2458, OIG file # 2-85- 01455-5. Its presence in the OIG file is documented as follows:on a OIG Memo dated 12/24/85 by SA Fulgieri:

> "Special agent reviewed Bonnie Bergstein's Supplemental Security Income file XXXXXXXXXXXXX The file reveals that the subject interviewed Ms. Bergstein on 11/21/85. The file further reveals that the subject telephonically contacted Ms Bergstein on 11/25/85"

OIG file# 2-85-01455-6-7.

This document was photocopied without the consent of the SSI beneficiary, it could not have been obtained because no record of contact with the SSI beneficiary is evidenced until 24 March 1986, three months later. This document was then included in

included on the aforementioned Memorandum from the Regional Commissioner, Mr. Peter P. DiSturco, OIG file# 2-85-01455-6 30, and was included in the evidence used in the Proposal of Suspension of 9 May 1986, and was part of the Decision to Suspend to Suspend of 24 June 1986, signed by Mr. Alex Bussey, ARCFO. Mr. Archibold Cox in his book, The COURT and the CONSTITUTION, page 237 in referencing the Mapp v Ohio, 367 U.S.643(1961):

> "The search and seizure described above were unquestionably illegal. One of the first grievances of the American people against King George III was that he denied them the protection afforded his subjects in Britain against entry into homes and offices under general warrants including royal officers to rummage about for evidence of crime even if there was no reason to believe that the evidence was there. James Otis and John Adams had roused the City of Boston against the searches...."

Mr. Cox went on in substance that the result was the Fourth Amendment to the Constitutions and many states including Ohio state the prohibition against unwarranted searches and seizures. This prohibition was again violated by this Agent in obtaining

the address via telephonic contact with Mrs. Gloria Grossi. The OIG file had her address by way of the 13 December, 1985 telephonic report from Mrs. Grossi to Mr. Fulgieri, OIG file# 2-85-01455-6-1. Mrs. Grossi testified under oath that she never met the SSI beneficiary until nine months later, the date of the MSPB hearing on 4 September 1986. Mrs. Grossi again released data from the SSI beneficiary's SSI records. This was again evidenced in the OIG file #2-85001455-6-20 dated 21 March 1986, which stated the mode of communication to be telephonic:

> "Contacted Gloria Grossi ADM, Melville Social Security Office Ms Grossi advised that SSA records reveal that Bonnie Bergstein recently changed her address on SSA records to XXXXXX XXXXXXXX N Y

Though this is sanatized, the next item on file in the OIG records is file # 2-85-01455-6-21, thus in sequence it is evidence of occuring next in the investigation. The information is of a contact at the City of Glen Cove, NY, and is again sanatized:

"Bonnie Bergstein -XXXXXXXXXXXXXXX XXXXXXXXX N Y - moved to XXXXXXXX XXXXXXX N.Y. XXXXXXX This information furnished by United States Post Office, Glen Cove, N.Y.

No contact is in evidence that a written consent was obtained to release any data in SSA records that would justify the use of any data obtained from the protection of section 1106 of the Social Security Act, and 5 USC 552, Freedom of Information Act, particularly 5 USCS § 552(b)(7)(C), SSR 82-42 (July 1982); Re Mengel (1962, WD Pa) 201 F Supp 687; 42 USCS § 9501 (H)(J).

The Decision to Suspend for forty days(40), change of duty station of greater travel distance, thus creating an additional financial expence; and the change of duty function, thus creating a mental duress that is and was not justified by any published listing of penalties, nor was the it proper to impose such penalties with hearsey evidence, Capobianco v. United States (394 Fed 2) 375; involuntry transfers are punishment enhancements, Spring v. United States (1974, CA 4 W Va) 492 F2d 1053, WERE VIOLATIONS OF DUE

process. It is very curious that the right to be confonted by my accussers, guaranteed by Amendment VI, was apparantly the result of a subpoena, there were no equal provision for allowing a subpoena for the expert witness of the appellent. The nature of the charge of sexual harrassment would have new meaning by way of second hand, or third hand, and in this case being based on fourth hand information. Who was my accuser on 12 December 1985? There was never an initiated complaint from the alledged injured party. To have sexual harassment there must be a person to whom the harrassment is directed to make the complaint of harassment. Harrassment denotes a pattern of conduct. Sexual defines the nature of the pattern. The pattern is not an allegation of uniguely singular incident. No other evidence was ever produced to support the pattern. Sexual requires that a definition of an act clearly is sexual in nature, not the nebulous belief of individuals who each add their own interpretation of what is sexual in nature.

As Mr. Archibold Cox stated in his aforementioned text this Court is the final say. He stated that this Court is not above the "law of the Land". But derives its natural existence embodied in just that - the law of the land. No one is above the law, but if you review this case it is apparent that a new meaning to being railroaded is being established. The Decision to Suspend was based on evidence illegally obtained; judgement was reached with admitted influence of slander and libel, I refer to Mr. Alex Bussey admission that he was not infallible when he responded to the question of his being influenced by the expunged stale reprimand, the data it contained was testified to be erroneous by Mrs. Marie Baran. Her testimony was unchallanged, and as such would have to stand as truthful, thus making the document the agency used in evidence libelous. Couple this to the clearly slanderous and libelous statements about the appellant and his workman's compensation claim, and we have assessment of

of the fact finder that the appellant had a "however slim" chance of escaping punishament. Thus the fact finder chose extremely questionable series of facts that were inherently improbable; she stated the appellant signed the statement of 13 January 1986; she interjected the "appellant" on three separate conclusions involving Psychiatrist note admitted into evidence from the SSI beneficiary's purse, the not was referring to the SSI beneficiary; she relied upon this psychiatrist's note for her credibility findings as it stated that the SSI beneficiary suffered from Anorexia Nervosa with severe depression, and that the SSI beneficiary was not delusional nor suffered from a thinking disorder. To any technician, it is obvious that an inherent contradiction exists in the above statement. How can one not suffer a thinking disorder and be diagnosed an Anorexic Nervosa? The fact finder even admitted that some of the literature submitted by the apellant indicated that some suffering

from a thinking disorder, but that is not indicative that all anorexics suffer a thinking disorder. It is on this factor that a major error is evident in the fact finder's judgement. In the International Encyclopia of Psychiatry, Psychology, Psychoanalysis & Neurology, Benjamin B. Wolman, editor, volume 2, we find the folowing:

> "PRIMARY ANOREXIA NERVOSA
> ...Analysis of the interactional patterns preceding the manifest illness reveal forces that had resulted in deficiencies in conceptual and perceptual awareness of bodily needs.
> Disordered psychological functioning can be identified in three areas: 1) a disturbance in body image and body concept of delusional proportions; 2)inaccurate and confused perception and cognitive interpretation of stimuli arising in the body, with inaccurate hunger awareness as the most pronounced deficiency; and 3) a paralyzing sense of ineffectiveness that pervades all thinking and activities(Bruch,1973)
> ...Another characteristic manifestation of falsified body awareness is the absence of fatigue in spite of constant hyperactivity. Anorexics are able to walk, swim, or do calistics by the hour. the absence of sexual feelings, failure of sexual functioning and amenorrhea, may also be considered in this context. Other sensations, such as temperature awareness or sensitivity to pain, are incorrectly perceived or responded to. Anorexics are also deficient in identifying emotional states, and even severe depressive feelings may be masked.

The other half of the diagnosis is "severe depression" which the aforementioned quote states is often masked. It is this diagnosis that an Administrative Law Judge, Office of Hearings and Appeals, Social Security Adminisration, reversing two prior denials, found the SST beneficiary to be Disabled pursuant to the SSA Disability Listings, and SSR 83-17. This finding could only be because of a Mental Disorder for Depression! Anorexia Nervosa is a manifestation of this severe condition. It is this condition that has signs and symptoms which the fact finder misconstrued as manifestations of a credible person. We find in the American Handbook of Psychiatry, Volume Three, Silvano Arieti, editor, a Chapter 18, titled "The Psychodynamics of Neurotic Depression" by Walter Bonime.

> "...The explanatory mechanism for neurotic depression are frequently the same as those offered for nonneurotic depressions, and this further compounds clinical and conceptual confusion....
> ...Freud, in 1917 then wrote 'Mourning and Melancholia' in which he described the patient as replacing the lost object with his own ego, a process of ident-

ification by which he could express his affective ambivalence toward the lost object. His hatred (sadistic component of love) could thus be expressed toward himself. In mourning the loss, is conscious, differing from melancholia, in which the loss is unconscious and sometimes not real. The identification in melancholia with an object toward which there are ambivalent feelings results in a symptomatology explained as the directing of accusations and attack upon the self for what is specifically hated in the lost object.

Abraham in his later, extensive 1924 paper, then presented the identification described by Freud as a devouring of the lost object and thereby accounted for the predominating oral factors in depression....

Ideally, a dynamic view, to be authentic, must emerge in each case from intensive observation of and with the individual patient.

This great difficulty in understanding the psychodynamics of the depressive is well described by Sullivan when he says, "So involved does the observer become in the symptoms and signs the defensive operations, that the person displaying these remains most remarkably obscure and unknown"(p.201). It does not matter that he was referring specifically to manic-depressives - many a minor depression, such as that of a sulking child or sulking spouse or sulking neurotic patient, produces qualitatively the same response in the "observer." If precisely this remarkable, frustrating, obscure involvement of the observer is considered a part of what may be a depressive's purposeful manner of relating, it correlates with a broader hypothesis concerning depressive psychodynamics. Such an hypothesis, which has developed from the writer's experience as a psychoanalyst and which has become increasingly a useful work-

ing concept, is depression as a practice.

The basic outline of this concept is that the depressive is an extremely manipulative individual who, by helplessness, sadness, seductiveness, and other means, maneuvers people toward the fulfillment of demands for various forms of emotionally comforting response. The emotional and behavioral corollary to this extreme manipulativeness is an almost allergic sensitivity to being influenced:... Frustrated in the consummation of his demands, the depressive becomes covertly (and less frequently overtly) hostile, sometimes anxious, often both. His manipulation continues then with the same goal - to elicit service or other subjectively gratifying response - but methods become more desperate, that is to say, rarely overt rage, usually emotional bullying and blackmailing expressed in various forms of ostentatious pitiable collapse and self-injury. If he must forego service and emotional solicitude, he fulfills his emotional requirements with sadistic satisfactions instead, by revengeful punitive activity. During this behavior, the depressive is usually strangely unaware of his hostility, frequently not aware of his anxiety, almost never aware of the excessiveness or at times even the nature of his demands; rarely is he aware of his manipulativeness....

Those who deny him, who undermine h living techniques and cause him frustration, deprivation, ange, and anxiety, and those who press him with responsibility will be punished or outwitted or both, at any cost to himself - even his sanity or his life. He will sacrfice some potentials for living, but in his subjective, distorted, competive emotional orientation he will nevertheless be victorious.

> A great deal of what the depressive feels, thinks, and does can be comprehended, at least tentatively, within the framework just offered. To examine his pathology more closely, it will be convenient to consider his psychodynamics in a few crutial separate, though overlapping, categories. These are manipulativeness, aversion to influence, unwillingness to give gratification, hostility, and anxiety."

This is how the petitioner was manipulated during the interview of 21 November 1985, to allowing the SSI beneficiaries to strike a compassionate reponse and giving her a telephone number by which she could contact me. This could not be harassment by me, if she had to call me. It was for this reason that at first I dialed her the night of 21 November 1985, but terminated the connection before completing the contact. I saw no objection by her based on the request she made for the number. However, I subsequently realized the late hour, and that it would have been inapproriate to carry on government business from my night employment. My compassionate reaction was misinterpreted as having sexual connotations. It is for this reason a more definitive state-

ment be established that will clearly define sexual nature. This was not done by the agency. The allegations were accepted on face value, without due consideration for any other factors. According to the agency, and even the fact finder ruled on this, because the allegation was made, it must have been thought as truthful. The fact finder ruled over the objection of my counselor, on the admissability of the truthfulness of the allegations as they were being testified to by Mr. Len Tuzman, who admittedly stated under oath he never saw the SSI beneficiary until the day of the hearing, 4 September 1985! The fact finder also ruled on the testimony of the petitioner, 24 hours before he was to testify, that he is not permitted to relitigate the stale reprimand, as he intends to do. Thes two rulings plus the denial of allowing Mr. Richard Kirshner to testify for the appellant, after he patiently waited, was called, but denied the privilege to testify, all indicate a strong prejudice and preconcieved assess-

ment of facts presented in evidence and give more definitive meaning to her finding of "however slim". By not fairly assessing the psychiatric evidence to ascertain the state of mind at the time of the alleged incident, the fact finder committed serious error in her credibility findings. As provided by rule 52 of the judicial procedure, this Pro Se petitions this Court to overturn the credibility findings based on error. United States v Mc Bride (1986, CA2 NY) 786 F2d 45; Moro Arroyo v Secretary of Health & Human Services (1985 DC Puerto Rico) 622 F Supp 1579; Universal Camera Corp. v NLRB (1951) 340 US 474, 95 L Ed 456, 71 S Ct 456.

The question of sexual nature is not explicitly defined in federal statute, and therefore, a meaning can only be derived from some other reference. The most explicit definition, but concise, yet leaving nothing to the imaginationa is found in New York Jurisprudence. Since the allegation ~~occured~~ OF AN

incident is presented in the Council Chambers of the City of Glen Cove, it appears that jurisdiction would lie with the appropriate State Statute. When we review that Jurisprudence iftis found to have very clear expressions, which have been upheld by a very strict interpretation of the Statute. In 32 NY Jur 2d (b) Sexual Abuse (SS 556 - 563) we find the following:

> S 556. General, definitions
>
> Those definitions that are applicable to sex offences generally, such as "female," "forcible compulsion," and the like apply to the offense of sexual abuse regardless of the degree of the offense.(CLS CPL S 130.00) However, the statutory definition of the term "sexual contact" apparantly is applicable to only the offense of sexual misconduct.People v Vicaretti (1976, 4th Dept) 54 AD2d 236, 388 NYS2d 180.
>
> S 557. Sexual contact
>
> The term "sexual contact" appears to be applicable to the offense of sexual abuse. Sexual contact means any touching of the sexual or other intimate parts of a person who is not married to the actor, provided the purpose of the touching is to gratify the sexual desire of either party. CLS Penal Law S 130.00 subd 3.The courts have upheld the validity of the words intimate parts and sexual contact, describing the statutory language as neither vague nor uncertain. People v Blodgett (1971, 3d Dept) 37 AD2d 1035, 326 NYS2d 443.

The term sexual contact is equally applicable to such acts as the manipulation of a boy's genitals, digital penetration of a girl's genitals, and unconsented fondling of a woman's breasts. PeoplevVicaretti (1976, 4th Dept) 54 AD2d 236, 388 NYS2d 410. However, the history of this statute makes it apparentthat the legislature intended the phrase "sexual contact" not to be restricted to the reproductive organs, People v Blodgett (1971, 3rd Dept) 37 AD2d 1035, 326 NYS2d 14, the erogenous zones, Re M. (1978) 93 Misc 2d 545, 403 NYS2d 178, or the sexual parts in the traditional sense. People v Thomas (1977) 91 Misc 2d 724, 398 NYS2d 821. For example, the buttocks is considered a private part for purposes of sexual contact. Re M.(1978) 93 Misc 2d 545, 403 NYS2d 178; People v Thomas (1977) 91 Misc 2d 724, 398 NYS2d 821.

The required purpose in sexual contact, that of gratifying the sexual desires of either party, should eliminate the touching of a person's sexual or other intimate parts in a manner that is merely incidental or inadvertent. People v Belcher (1949) 299 NY 321, 87 NE2d 278; People v Groszman-Bagrati (1960, City Ct) 202 NYS2d 572. Nonetheless, the scope of the statutory language was broad enough to apply to the touching of a female's buttocks, without her consent, while she and the defendent were riding a rush-hour train. People v Thomas (1977) 91 Misc 2d 724, 398 NYS2d 821. It is not necessary that the aggressor be attempting to excite the the erotic desires of his victim. Indeed, the aggressor's intention regarding his effect on the victim is irrelevant, since the abuse of another's boby and privacy with the intention to obtain sexual gratification on the part of the abuser is sufficient. Re M.(1978) 93 Misc 2d 545, 403 NYS2d 178.

> The use of the term "touching" to define sexual contact has led to a strict interpretation of the statute, limiting its application to only those instances of digital manipulation or manual handling or fondling. People v Vicaretti (1976, 4th Dept) 54 AD2d 236, 388 NYS2d 410....

The essential ingredient is the complaint of the person abused. When and where did the SSI beneficiary make that complaint? Is she incompetant that a complaint would be filed on her behalf? No evidence of incompetance was ever entered! The question now rests on a significant point, was there truely a misconduct based on a sexual harassment? The agency erred in its assessment of a Department of Labor Statute by applying Social Security standards, Why could it not err in its application of a Federal Statute designed to remove offensive conduct from the work-place? Was it appropriate to involve the Inspector Generals Office in an Administrative Action?

The Agency-initiated suspension, change of duty station, change of job duty, was taken pursuant to Title 5 of the Code of

Federal Regulations (CFR), Part 752, on the Decision to Suspend, June 24, 1986.

In substance this notice enumerated appeal rights as follows:

> "...You have the right to appeal this decision to the Merit Systems Protection Board (the Board) and have a hearing on the issue of whether your suspension was for proper cause and was properly carried out.
> Should you appeal to the Board, you may also raise a discrimination complaint with the Board if you believe your removal was additionally based on discrimination complaint because of race, color, religion, sex national origin, age,(provided that at the time of the alleged discriminatory action on the basis of age, you were at least 40 years of age), or mental or physical handicapping condition....
>
> As an alternate to the formal appeals process, you may elect the Board's Voluntary Expedited Appeals Procedure, which is described in the attachments. If you appeal to the Board, you should state that the records of your case may be obtained by writing to Mr. Albert Bernzweig, District Manager, address below. This information will assist the Board in processing your appeal.
>
> As an alternative to the above described 5 CFR Part 752 direct appeal to the Board, you may appeal to this Department under 29, CFR Part 1613, Equal Opportunity, if you believe that your removal was based on discrimination because of race, color, religion, sex, national origin, age(provided that at the time of the alleged discrimination you were at least 40 years of age) , or a mental or physical handicapping condition....

As an alternative to the above described appeals, in accordance with the National Agreement between the Social Security Administration and the American Federation of Government Employees, you may grieve this action.

No mention in any of these avenues of appeal is there any reference to a trial by jury as is provided by Amendment VII of the Costitution. In effect this right is abrogated by not providing this option in the course of appeals. Any claimant for benefits can exercise this right after exhausting the administrative process. The appeal to the Merit System Protection Board has no provision for trial by my peers. When that Board can subpoena unwilling complainants, deny witnesses as not being relevant before hearing the actual testimony, rule on the intent of the appellant before the appellant testifies, there appears to be abuse of judicial procedure without any check. The United States Court of Appeals for the Federal Circuit does not review the procedures but issues a judgement that the decision of the Board is "virtually unreviewable." Why were the Bill of Rights included in the

Constitution? Why was the separation of powers so important to our founding fathers?

Those men who convened in Philadelphia in 1787, and whose deliberations gave us the most respected document in all history, knew well that by allowing the powers of lawmaker, law enforcer, and judge to be gathered in one place would mean the end of freedom. Thomas Jefferson said of the need to keep government power's separate:

> The want of it has been the source of more evil than from any other source.

Our first President, Mr. George Washington commented on the three branches of government as follows:

> The Spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever form of government - a real despotism.

In conclusion, the Department of Labor Order to Vacate surprised the Management of SSA. It never occurred to them that they had misapprehended the law. I was fighting the spector of misrepresentation and/or fraud. How, under this spector, could I be found

Credible? It was impossible! I never was given a fair chance to defend myself! My informal brief establishes and documents all that I have said above. It establishes the Nexus of why two agency personnel went to great lenghtbs. They acted in retaliation to my being a witness against them in a FLRA Case # 2-CA 50089. On July 3, 1986, Mr. Albert Bernzweig stated that things would have been different if I had forced the Union to drop its ULP, Unfair Labor Practice, last year by threatening the union that I would quit the union. This later statement was found to be violative of statute in FLRA Case # 2 CA - 60356. This is why my initial appeal to the MSPB was separated into two dockets. I could not present all the evidence if I had to defend against! This is why this requestas wasmade to this Court.

I asked this Court to reverse the Decision of 24 June 1986, set aside the finding of the fact finder as it was in error, reverse the Judgement of the Tribunal, and

make whole all that was done to this Pro Se petioner.

CONCLUSION

For the foregoing reasons, the petitioer Leonard J. Marotta respectfully requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Federal Circuit, docket number 87-3511, entered on 9 December 1987.

Respectfully submitted,

DATED: 28 February 1988. Leonard J. Marotta

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A P P E N D I X A

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-3511

Leonard J. Marotta,

Petitioner,

v.

Department of Health and Human Services,

Respondent,

DECIDED: December 9, 1987

Before MARKEY, Chief Judge, NEWMAN, and ARCHER, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, MSPB Docket No. NY07528610488, sustaining the agency's suspension of petitioner Leonard J. Marotta, is affirmed.

OPINION

Mr. Marotta was suspended for forty days from his position as Field Representative

with the Melville, New York district office of the Social Security Administration, for sexual harassment of a female Supplementary Security Income beneficiary. The board upheld the suspension based on testimony of the beneficiary and others, including petitioner's supervisor.

The issue turns solely on the credibility of the witnesses, a matter that is "virtually unreviewable" by an appellate tribunal. Hambach v. Dept of Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986). See Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

There was substantial evidence supporting the board's decision. The penalty imposed was not an abuse of discretion. 5 U.S.C. § 7703(c). The decision is affirmed.

A P P E N D I X B

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-3511

Leonard J. Marotta,

Petitioner,

v.

Department of Health and Human Services,

Respondent.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing is declined.

THE COURT:

(SIGNATURE)

Francis X. Gindhart, Clerk

Date

cc: Mr. Leonard J. Marotta
Ms. Katherine A. Day, DOJ

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-3511

LEONARD J. MAROTTA,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

JUDGEMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO NY07528610488

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED DEC 09 1987

(SIGNATURE)
Francis X. Gindhart,
Clerk

ISSUED AS A MANDATE: JAN 28 1980

APPENDIX B-2

A P P E N D I X C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

LEONARD J. MARCOTTA, Appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.	Docket Number NY07528610488 DATE: November 14, 1986

Thomas J. Mackell, Esquire, Mackell and Robertson, Forest Hills, N.Y., for appellant.

Allen Friedland, for the agency.

BEFORE

BONITA KIRKLAND, Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed a timely appeal from the agency's decision to suspend him from his position for a forty-day period. Because the appellant established that the Board has jurisdiction over his appeal, a hearing was held on 5 U.S.C. §§ 7511(a)(1)(A), 7512(2), 7513(d), 7701(a)(1982). For the

reasons that follow, the appellant's suspension is affirmed.

FINDINGS AND ANALYSIS

Background

The appellant is employed as a Field Representative with the Social Security Administration's district office in Melville, New York. The majority of his work is performed in locations outside of the district office; one such location is the Town Hall in Glen Cove, New York. There the appellant, along with one or two other field representatives, erect a portable office in which they interview clients. 1/

1/ In front of the room used for the interviews is a long waist-high counter; behind it is a long table. The field representatives place a wooden barrier on top of the counter. This barrier has three dividers: one on each end and one in the center. These dividers, which only extend to the width of the table, separate the interview space two work areas. The work areas are open in the back and the field representatives, who sit within arm's reach on either side of the center divider, can see each other without difficulty.

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One of these clients, Ms. Bonnie Bergstein, complained that she was sexually harassed by the appellant. During the course of the agency's investigation, another client, Rebecca De Young, was said to have a similar experience with the appellant. The agency's Standards of Conduct (4 C.F.R. § 73) define and proscribe sexual harassment. Based upon the allegations of Ms. Bergstein and Ms. DeYoung, the appellant was suspended and reaasigned to a branch office position within the agency.

1/cont. Their is a chair on the side of the field representative for the client. Thus, the nature of the privacy provided is that persons in front of the counter of the barrier cannot see anything behind it. Anyone standing on the side of the barrier can see into the interview spaces. The clients, who can see each other, are separated from each other only by the field representatives' chairs. (Appellant's Exhibit 1.)

2/ The reassignment was separately appealed.

APPENDIX

The Agency's Evidence

Only one of the complainants testified. Ms. Bergstein stated that in November of 1985, she was not a recipient of social security benefits. Based upon her disabilities, she had applied for benefits, but her claim had been denied and she was uncertain about the status of her appeal of the denial. She received a letter informing her that she had to report to the Glen Cove location for an interview. She was unaware that she had been approved for her benefits and believed that the interview concerned getting approval.

Ms. Bergstein testified that after she sat down next to the appellant, he told her to move her chair closer to him. Thereafter, he placed his hand on her right knee and kept it there as he asked her questions about her claim. Initially, testified the witness, she felt ambivalent about the appellant's hand on her knee because she believed that he had placed it there in a reassuring gesture. Nonethe-

APPENDIX

less, she felt intimidated; she had waited a year to get the interview and did not want to make trouble.

When the appellant's hand crept up her thigh, Ms. Bergstein testified, she moved it away. The appellant told her he was married, but asked if she would go out with him. Ms. Bergstien stated that because she wanted to be diplomatic, she told the appellant that she did not date married men; the appellant persisted. He told Ms. Bergstein that he worked at a motel several nights a week and asked her to meet him there.

At the conclusion of the interview, the appellant asked Ms. Bergstein to move her chair closer. He took out his business card, crossed off one of the numbers. He then gave Ms. Bergstein the card and instructed her to write on the back. When she finished, the appellant informed her that the telephone number that she had written was the number for the motel, and the hours written, were his work hours at

the motel. The appellant then told Ms. Bergstein that he hoped she would call and meet him at the motel.

Ms. Bergstein needed her birth certificate in order for her paper work to be completed. She left and returned with it. The appellant was with another client, therefore, Ms. Bergstein asked another field representative if he would take it. She was told that the appellant had done her paperwork and would have to record the information. When Ms. Bergstein said that she had to leave, the appellant called out for her to wait; she did not. Ms. Bergstein stated that she was so upset during the interview that she could not concentrate abd did not know what was said about her benefits.

The appellant's contact with Ms. Bergstein contact continued after the interview. Ms. Bergstein testified that that night, at approximately 11:30 p.m., the appellant called her at home to tell her that he would have given her a ride

none if she had waited. 3/ The following day, testified Ms. Bergstein, the appellant again called her at home. She was confused about some of her benefits and he tried to explain them. It was either during this call or the susequent call that the appellant again urged her to meet him at the motel. Three days later, on November 25, the appellant telephoned her twice. Ms Bergstein testified that she immediately hung up as soon as she heard his voice. Ms Bergstein denied that she ever told the appellant that she wanted him to personally to handle her case or that she needed a telephone number to contact him about her benefits.

When the appellant made the telephone calls on November 25, Ms. Bergstein was not alone. Her social worker, Cheryl Lewis was present and Ms. Bergstein told her about the appellant's advances. Ms. Bergstein also told her roommate, Rebecca DeYoung, about the appellant's advances. Ms. Bergstein testified that Ms. DeYoung revealed

to her that the appellant had made advances to her.

Cheryl Lewis testified that she had been Ms. Bergstein's social worker since February of 1985 and that they had weekly contact with each other. During their visit on November 25, Ms. Bergstein gave her the appellants business card, told her about the appellant's conduct during the interview and about the telephone calls that he made. Ms. Lewis testified that she was present when two of the calls were made. Ms. Lewis further testified that she believed all that Ms. Bergstein told her and reported it to her supervisors at Long Island Jewish Hospital.

3/ The appellant (sic) did not answer this call. During one of the other calls the appellant told Ms. Bergstein about his attempt to reach her that night.

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The complaint to the agency was made by Mr. Leonard Tuzman, the Associate Medical Director for the Hospital. When he received the report from Ms. Lewis and her first line supervisor, he called the appellant's supervisor to lodge a formal complaint. The complaint led to the investigation by the agency.

Special Agent Richard Fulgieri of the agency's Office of the Inspector General was assigned to the case. He testified that he interviewed several people in connection with the case. When he interviewed Ms. Bergstein, she confirmed the complaint that the hospital had relayed to the agency. He also interviewed Ms. Rebecca DeYoung.

Special Agent Fulgieri gave this account of his interview with Ms. DeYoung: She told him that she had been interviewed at Glen Cove by the appellant. During the interview, the appellant fondled her leg and asked her out. The appellant gave Ms.

The appellant gave Ms. DeYoung the motel number and asked that she call him at that number.

The appellant's immediate supervisor, Ms. Gloria Grossi testified about the complaints (sic) and her conversations with the appellant about the interview with Ms. Bergstein. Her testimony was very credible and her concern and outrage about the alleged misconduct were still readily apparent from the tone of her testimony and from her demeanor. Ms. Grossi stated that the appellant was a good field representative and had been rating "fully satisfactory" during his last rating period.

According to Ms. Grossi, after the investigation commenced, the appellant explained to her that he had given the office number and motel numbers because he wanted her to have direct access to him on her case. He called Ms. Bergstein after hours because she was on his mind and wanted to complete the information that he wanted her to have. Moveover(sic),

the appellant told Ms. Grossi that he felt sorry for Ms. Bergstein because she was upset and pathetic client.

Ms. Grossi testified that the appellant's admitted actions were inappropriate and unprofessional in a number of respects. He represents the agency in the eyes of the public and in this case, the appellant lost his professional detachment. The appellant should not have given Ms.Bergstein the agency's private telephone number. The number that he crossed off was the general public number. The telephone number that he gave her was a private number that is not given out to individual clients; it is reserved for major clients and institutions.

Ms. Grossi further testified that a client is never contacted hours and certainly never called at eleven P.M. Moreover, the appellant misrepresented the contact and control that he would have had over Ms. Bergstein's case. Any follow-up work would have been performed by a claim's (s.l.)

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representative, not by a field representative. One person does not handle a case exclusively. For all of these reasons, Ms Grossi proposed the appellant's suspension.

The Appellant's Evidence

The appellant's account of the incident is contained in a written statement he signed (sic) on January 13, 1986 and in his testimony that he presented at the hearing. (Agency File, Tab 2.) In both, he denied touching Ms Bergstein or Ms. DeYoung; he also denied making sexual advances towards either of them.

The appellant testified that he interviewed Rebecca DeYoung yearly to make a redetermination of her needs. He stated he never touched her.

The appellant denied that he touched Ms Bergstein. He testified that his interview with her on November 21 should have taken no more than thirty minutes, but it took seventy-five minutes due to

her emotional state and confusion. Ms. Bergstein's condition was due in part to the fact that she had been labled "disabled"; she was upset because she did not consider herself handicapprd. Because she was upset, the appellant asked Ms. Bergstein if she wanted to continue the interview late. She did not.

In order to complete her file, the appellant asked Ms Bergstein about her living arrangements and expenses. She again got upset when he tried to explain to her that her welfare program would be reimbursed from her initial social security benefits. The conversation drifted off on a tangent when he tried to reassure Ms. Bergstein that she would have enough money to survive, testified the appellant. He promised to look into the level of her other benefits and get back to her.

Ms. Bergstein wanted to know how to reach him about her claim. According to the appellant, she said that she felt comfortable with him and wanted to be able to

personally when she had questions about her claim. Therefore, testified the appellant he gave her his business card. He changed the telephone number on the card because he had overheard his supervisor tell the telephone company to change the main telephone number. The number that he gave the appellant was a number that he knew would not be changed. Because he was out of the office a lot, he gave Ms. Bergstein the telephone number at the motel.

Ms. Bergstein did not have her birth certificate, therefore the appellant instructed her to get it and to bring it back to him or to another field representative. When she returned the the appellant was told by another field representative that she she could not stay. The appellant testified that he needed to talk to her because there was other information that he needed. Ms. Bergstein left without his seeing her.

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That afternoon, the appellant testified, he called Ms. Bergstein to tell her that he had mailed a pamphlet to her; however, she did not answer the telephone. Later that evening, his wife told him about a co-worker who, like the appellant (sic), was an anoretic(sic). He thought of the appellant and tried to call her from the motel. As the telephone rang, he realized that it was a mistake to call so late; he hung up before the telephone could be answered.

The following day, November 22, he called the appellant in order to finish her case. He told her that he had previously tried to call her about the pamphlet, he then asked her questions he needed answered in order to complete the forms. On November 25, testified the appellant, he called the Ms. Bergstein again because he wanted to send her more information. When she answered the telephone, she said that she could not talk to the appellant and hung up. Another field representative, Mr.

Saglimbeni, was present during this call and the second call that the appellant made, according to the appellant. When he re-called, testified the appellant, Ms. Bergstein told him that she did not want to to talk to him. Thereafter, the appellant made no further attempt to contact the appellant(sic), he just mailed the forms to her, on the form he noted that he had tried to call her, but was disconnected. (Agency File, Tab 2.)

According to the appellant, he would never have an opportunity to touch Ms. Bergstein. Three field representatives handle the work at Glen Cove. One, usually Mr. Ivaney, serves as a receptionist and sits in front of the barrier. This person screens the public and frequently walks around the petition unannounced in order to get forms. This person also answers the telephone which is located in the interview space next to the appellant. In addition

to Mr. Ivaney going behind the panel, employees of the Town Hall would walk behind the panel and would have to be instructed to wait. The appellant recalled that there were interruptions of this sort on November 21, but not necessarily during his interview with Ms. Bergstein.

To corroborate his testimony, the appellant called Michael Saglimbeni, the field representative who interviews clients in the space next to the appellant. In addition to working with the appellant, the witness socializees with the appellant the appellant and has been in joint-business ventures with appellant. Mr. Saglimbeni did not remember the appellant's interview with Ms. Bergstein, but testified that he had never seen the appellant touch any interviewee. Mr. Saglimbeni verified that he would be able to see any person sitting with the appellant and that Mr. Ivaney is often in their side of the partition. Mr. Saglimbeni further con-

firmed that he overheard the appellant make two telephone calls on November 25, 1986(sic), The first, was a short conversation after which the appellant stated that he was disconnected. The appellant redailed and told him that the same thing happened.

Mr. Saglimbeni as did other character witnesses --neighbor William Wypyski and co-workers Carol Vence and Eileen Nietart -- all testified that the appellant enjoyed and unblemished reputation for honesty and trustworthiness.

Credibility Findings

Ms. Bergstein suffers from anorexia nervosa, and has been hospitalized for this condition and for depression. In 1984 she was admitted to an experimental psychiatric program at the New York Psychiatric Institute. As part of her treatment, she received drug therepy and was given antidepressants. In November of 1985, she was

a participant in a supportive living program under the auspices of the Long Island Jewish Hospital. For these reasons, the appellant contends that Ms. Bergstein is not a credible witness. In further support therof, the appellant submitted several medical dictionary definitions and articles on the diseases. (Appellant's Exhibition 2.)

I find that Ms. Bergstein was a highly credible witness. Her testimony was forthright and deliberate. There were delays in some of her responses, but the impression given was that Ms. Bergstein wanted to think about the phrsing of her answer rather than to give misleading testimony. The impression was reinforced by Ms.Bergstein's refusal to have words put into her mouth or to have her testimony mischaracterized. She appeared to be a careful listener and an articulate speaker. Any confusion that she exhibited I attribute to the amount of time that has elapsed since the incident rather than to confused think-

ing on the part of Ms. Bergstein. Ms. Bergstein's testimony was enhanced by her demeanor; it was calm and unflustered.

Moreover, Ms. Bergstein's integration into independent living was being monitored by the hospital through her social worker, Ms. Lewis. As stated previously, Ms. Lewis testified that she met with Ms. Bergstein weekly, and found her to be believable.

The agency submitted a letter from Ms. Bergstein's psychiatrist, Gloria Fleichman, M.D. Dr Fleichman confirmed the diagnosis of the appellant's(sic) condition as anorexia nervosa, with depression. According to Dr. Fleichman, the appellant(sic) is not psychotic and does not suffer from a thinking disorder.(Agency Exhibit 1.) This opinion is consistent with that literature submitted by the appellant. According to that literature, some anoretics(sic) may suffer from thinking disorders, but there is no evidence that all do. In this case, credible evidence establishes that Ms Bergstein's thinking was unimpaired. In view of the above., I find that Ms. —.

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Bergstein gave competant and credible testimony.

In comparison the appellant's testimony nothwithstanding the character references, was not as credible. The appellant admitted that he called the appellant at home on the evening of November 21, 1986(sic). He admitted giving her the motel's telephone number and the private number for the agency. The appellant is considered to be a good employee and, in fact, had been a supervisor before he made a voluntary request to be downgraded to his current nonsupervisory level. As such his conduct in calling Ms. Bergstein at home, giving her the private agency number cannot be excused as bad judgement or inexperienced.

As an experienced field representative, the appellant was aware of the inappropriateness of encouraging Ms. Bergstein or any client to make him personally accountable for her claim. I find that his reasons making the calls and giving her the tele-

phone number for the motel were, more likely than not, motivated by his desire for a social relationship.

I further find that Ms. Bergstein's account of the interview and of the appellant's touching her was more believable. The appellant made much to-do about the close quarters of the space in Glen Cove. However, from the pictures introduced by the appellant and from all the testimony offered, there was no evidence that the appellant would not have had an opportunity to touch Ms. Bergstein's leg and thigh. The chairs are close enough to each other for it to happen, and if the appellant(sic) did not raise her voice, there is no reason that Mr. Saglimbeni would have been alerted to look over. Thus, the fact that he did not witness an incident does not negate its occurance.

For these reasons, the preponderant evidence supports a finding that the ap-

pellant made improper advances to, sexually harassed, Ms. Bergstein, as alleged. The preponderant evidence does not support the charges with respect to Ms. DeYoung.

Ms. DeYoung was not called as a witness and there has been no opportunity to assess her credibility or competancy. Although Agent Fulgieri took a statement from her, the written statement in the record is in his own words or a statement that she was given to sign or verify. (Agency File, Tab3.) Although hearsay evidence is admissable at board hearings, this statement has been afforded little weight because it has not been shown to be reliable evidence. SEE BORNINKHOF v. DEPARTMENT OF JUSTICE, 5 M.S.P.B. 77, 85 (1981)

The specification that the charges the appellant with improper conduct with Ms. DeYoung has been denied by the appellant and not been supported by preponderant evidence; it is not sustained. The charge

that the appellant engaged in sexually harassing behavior with respect to Ms. Bergstein is sustained.

Procedural Error Allegations

The proposal letter informing the appellant of the charges against him reference a reprimand that the appellant received in 1983 (sic) for similar misconduct with a client at the Glen Cove location. The appellant argued that the agency should not have considered the reprimand because the circumstances surrounding it were never fully investigated. The appellant contends that the agency's reliance upon the reprimand with the coercive environment in which he was interviewed, constitute harmful error.

The burden of proving harmful error lies with the appellant. SEE 51 Fed. Reg. 25.164 (1986)(to be codified at 5 C.F.R. § 1201.56.4/ If the appellant proves harm-

4/ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. 1201. However, the

ful error, the suspension cannot be affirmed. 5 U.S.C. § 7701 (c)(1982). In order to prove harmful error, the appellant must show that, but for the error, the appellant must show that, but for the error, he might have had an opportunity, however slim, of avoiding discipline. SEE Monroe v. Department of Treasury, 770 F.2d. 1044, 1047 (Fed Cir. 1985). The appellant has not established such proof.

Although the reprimand is shown on the notice of proposed removal, there is no evidence that it was relied upon by the official when he made his decision to suspend the appellant. The decision was made by the Agency's Assistant Regional Commissioner, Alex Bussey. Commissioner Bussey gave credible and unimpeached testimony that he was aware of the reprimand when it was issued; therefore, its mere

4/ continued - parties should refer to 51 Fed. Reg. 25.146-72 (1986) for the text of all references to this part.

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inclusion in the letter of proposed suspension did not work not work to the appellant's detriment. Commissioner Bussey further testified that reprimands are normally expunged from an employee's record after one year has passed. Because of this he did not rely on the reprimand in determining the level of discipline to be imposed against the appellant.

The appellant has failed to show harmful error in the issuance of the notice of proposed suspension. Similarily, the appellant failed to support his contention that harmful error occured during the investigation of the charges. The appellant did not identify an error or procedures to which he was entitled that were violated. A naked allegation of error does not establish proof of such an error. Accordingly, the appellant's affirmative defenses are dismissed.

Nexus

An agency may only take an adverse action when to do so promotes the effici-

ency of service. Alternatively stated, the agency must establish that there is a nexus between the employee's misconduct and the efficiency of the service. 5 U.S.C. § 7513 (a)(1982).

The articulation of nexus consideration was presented in Ms. Grossi's testimony. She testified that the appellant's misconduct brought discredit upon the agency. This discredit was by means of a formal complaint from the hospital on behalf of Ms. Bergstein and concerning the well-being of all of their clients.

Ms. Bergstein testified that the appellant's conduct upset her and caused her to be apprehensive about whether she would receive social security benefits. Thus, the appellant's misconduct jeopardized the agency's image and the confidence that a client had in the impartiality of its programs.

Normally charges of sexual harassment stem from conduct that occur on the work site between co-workers. However, the la-

ble of sexual harassment has been broaded by the Supreme Court of the United States to include other sexual misconduct which has the purpose or effect of creating an intimidating, hostile, or offensive environment. MERITOR SAVINGS BANK V. VINSON, 106 S. Ct. 2399, 2409 (1986). While the appellant and Ms. Bergstein and the appellant were not co-workers, Ms. Bergstein had to operate within the appellant's work environment in order to secure her disibility benefits.

The Board has held that sexual harassment is extremely serious misconduct which undermines the efficiency of the service. SEE CAROSELLA V. U.S. POSTAL SERVICE, 30 M.S.P.R.199 (1986); EVANS V. DEPARTMENT of the ARMY, 22 M.S.P.R 340(1984).

Under the circumstances, the record evinces that the appellant's misconduct had a negative impact upon the efficiency of the service. Nexus has been established by preponerant evidence.

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The Appropriate Penalty

In cases where sexual misconduct has been found, the Board has upheld the agencies' determinations to effect a severe penalty. Thus, removals 5/ and demotions 6/ have been sustained as appropriate penalties.

Assistant Regional Commissioner Bussey testified that he selected the penalty of a forty-day suspension based upon the the seriousness of the misconduct and the damage to the efficiciency of the service that had been incurred by the agency. In selecting the penalty, he considered the facts that a field representative works with great autonomy and must be reliable, and that the appellant had provided nineteen years of good service to the agency.

5/ The supervisor in the case of Carosella v. United States Postal Service, 30 M.S.P.R. 199(1986) was removed for sexually harassing subordinates. There is no evidence that any physical contact was made with employees. In the case of Pugh v. United States Postal Service, 20 M.S.P.R. 326(1984) The Board agreed with the agency that the penalty of removal for sexual harassment should not have been mitigated by the administrative judge hearing the appeal. The Board held

Because he believed the appellant could be rehabilitated, a more severe penalty was not selected.

The appellant contested the severity of the penalty, but did not identify any factors not considered by the agency. He provided character witnesses and produced letters written on his behalf and his most recent performance rating. (Appellant's Exhibits 3,4, and 7.)

The Board's role in reviewing the penalty selected by the agency is not to substitute its judgement for that of the agency. The review is to determine whether the agency conscientiously considered the relevant factors and selected a penalty that

5/continued, that removal was not too severe a penalty even though the employee was not a supervisor and the harassment (which) involved a physical contact) stemmed from a single incident.

6/In the case of Evans V. Department of the Army, 22 M.S.P.R. 340 (1984). The Board upheld the demotion of supervisory employee who was found to have sexually harassed a subordinate. The supervisor had twenty-nine years of service and a previously unblemished record.

falls within the tolerable limits of reasonableness. SEE Douglas v. Veterans Administration, 5 M.S.P.R. 280, 300-301 (1981). In view of the facts of this case, the penalty of forty-day suspension falls well within the bounds of reasonableness.

DECISION

The appellant's suspension is AFFIRMED.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on December 19, 1986, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5C.F.R. SS 1201.113-.117 (1986). Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Ave., N.W.
Washington, D.C. 20419

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in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. The parties should note that they are required to serve any petition for review and any subsequent pleading on all parties. The petition for review must be filed on or before December 19, 1986 and must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

Any appellant adversely affected or aggrevated by a final decision of the Board may file a petition with the United States Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. § 7703. A petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days after the Board's decision becomes final. Petitions must be sent to:

U.S. Court of Appeals for the Federal Circuit
717 Madison Place N.W.
Washington, D.C. 20439.

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For the Board:

(signature)
Bonita Kirkland
Administrative Judge

APPENDIX

A P P E N D I X D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEONARD J. MAROTTA Appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.	DOCKET NUMBER NY07528610488 DATE: JUL 2 1987

Douglas L. Chauvin, American Federation of Government Employees, New York, New York, for the appellant.

Allen Friedland, New York, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued November 14, 1986, which sustained the agency's action suspending him for forty days from his position of Field Representative in the Melville District Office of the Social Security Administration. The agency based the suspension on a charge that the appellant sexually harassed two Supplemental Security Income (SSI) beneficiaries,

adversely affecting public confidence in the integrity of the government. For the reasons set forth below, the Board GRANTS the appellant's petition. 5U.S.C. § 7701(e); 51 Fed Reg 25.158 (1986)(to be codified at 5 C.F.R.§ 1201.116.1/ The initial decision is AFFIRMED as MODIFIED, and the agency action is SUNTAINED.

BACKGROUND

The agency charged that the appellant violated its regulations, 45C.F.R. §§ 73.735-306 and 73.735-508(f). prohibiting sexual harassment and conduct adversely affecting the confidence of the public in the integrity of the government. The agency based this charge on certain conduct of the appellant, a male, with regard to two female applicants (hereafter "Applicant

1/On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, cititations will be to the Board's regulations at 5C.F.R. Part 1201. However, parties should refer to 51 Fed.Reg. 25-146-72 (1986) for the text of all references to this part.

I"and "Applicant II"), both of whom had been interviewed for SSI benefits by the appellant at the agency's GlenCove interview location.

On November 21, 1985, the appellant interviewed Applicant I. The agency alleged, that during the course of the interview, the appellant placed his hand on her right knee and and(sic) kept moving his hand up her thigh. The agency also alleged that the appellant told her that he was married but did not object to "fooling around" and invited her to meet him at a motel. The appellant worked at the motel, and he gave Applicant I his agency business card, with thetelephone number for the public to call deleted and the agency's internal number, not to be given to regular client's written in. The appellant dictated the motel's telephone number and his work hours there to Applicant I and had her write them on the back of the business card. In addition, the agency the agency

charged that the appellant telephoned Applicant I at her home sometime after 11:00 p.m. on November 21,, 1985; he also called her on November 22, 1985, again suggesting that she meet him at the motel; and he called her twic on November 25, 1985, when he also asked her to meet him at the motel. On November 25,1985, Applicant I reported the appellant's conduct to her social worker, an employee of the Long Island Jewish Medical Center. The social worker in turn reported the incident to her supervisor, who brought the incident to the attention of the Associate Director for Social Work, Mr. Leonard Tuzman. Mr. Tuzman contacted the Melville District Office of the Social Security Administration to complain of the appellant's conduct toward Applicant I.

During its investigation of the appellant's conduct toward Applicant I, the agency also obtained a statement from Applicant II that, approximately three years earlier, when the appellant had interviewed Applicant II concerning her ap-

plication for SSI benefits, he also placed his hand on her leg and suggested that she meet him at a motel. Applicant I and Applicant II were roommates.

After a hearing on the appeal, an administrative judge from the Board's New York Regional Office found that the agency had supported its charge with respect to Applicant I by the preponderance of the evidence but failed to prove it with regard to Applicant II, who did not testify at the appeal hearing. The administrative judge further found that the appellant had not established his administrative defence of harmful error with regard to the agency's reference to a prior reprimand for similar conduct. Although the administrative judge sustained only part of the agency's charge, she sustained the full forty-day suspension.

The appellant has now filed a lengthy petition for review with additional exhibits and portions of an unofficial transcript. The appellant alleges that the ad-

ministrative judge erred in finding the appellant less credible than Applicant I, and cites Applicant I's psychological condition, anorexia nervosa and depression, and alleged inconsistencies in her testimony as grounds for disbelieving her. The appellant also alleges that the agency erred in relying on hearsay evidence in bringing this action against him and in relying on a prior reprimand. That reprimand was for allegedly similar misconduct, which occurred approximately four years earlier. The appellant asserts that the collective bargaining agreement precluded reliance on a reprimand older than one year and that the agency's reliance on his prior reprimand constituted harmful procedural error requiring reversal. Finally, the appellant asserts that the agency could not charge him with sexual harassment for conduct not directed toward a fellow employee. 2/

2/We have also reviewed the appellant's

ISSUES

1. Did the administrative judge err in assessing the probative weight of the evidence when she found that Applicant's I's testimony was more credible than the appellant's evidence concerning his conduct?

2. Did the appellant's conduct toward Applicant I constitute sexual harassment?

3. Did the agency commit harmful procedural error by relying on the appellant's prior reprimand for allegedly similar misconduct?

4. Was the sustained penalty, a forty-day suspension, reasonable in view of the fact that not all of the charge was sustained?

ANALYSIS

Initially, we note that additional exhibits submitted by the appellant with his petition for review do not meet the

2/continued- additional contentions in his petition for review and we find that they constitute mere disagreement with the administrative judge's findings and, there-

criteria of new and material evidence and will not be considered. SEE Avansino v. United States Postal Service, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite a party's due diligence). The appellant had the opportunity to raise or during the closing argument, to introduce direct evidence concerning the provisions of the collective bargaining agreement which affected the prior reprimand, and to present evidence concerning the respectability of the motel at which he worked.

Further, we cannot rely on the appellant's unofficial transcript of portions of the hearing testimony. The appellant's

2/continued -fore, do not warrant review. See Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133-34(1980), AFF'd, 669 F.2d 613(Fed Cir. 1982) (mere disagreement with the administrative judge's findings, credibility determinations, and conclusions does not warrant full review of the record by the Board).

submission consists of selected excerpts, carefully drawn to support his arguments, and is not necessarily an accurate reflection of the testimony as a whole. In discussing the witnesses' testimony, we rely on the tape recordings, which are the official, verbatim record of the hearing. See Gonzales v. Defense Logistics Agency, 772 F2d 887, 890 (Fed.Cir. 1985); Tracy v. Department of the Army, 23 M.S.P.R. 115, 117 (1984). We note, from our review of the tapes, that they were completely audible.

1. The administrative judge did not err in assessing the probative weight of the evidence when she found that the Applicant 1's testimony was more credible that the applicant's.

We note initially that the administrative ludge made detailed credibility findings, including an extensive discussion of the witnesses demeanor. The Court of

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Appeals for the Federal Circuit requires the Board to afford particular deference to such credibility findings. SEE Hambach v. Department of the Treasury, 796 F.2d 430, 436(Fed. Cir. 1986), and Jackson v. Veterans Administration, 768 F.2d 1325, 1331 (Fed. Cir. 1985)(special deference must necessarily be given to an administrative judge's findings regarding credibility where such findings are based on the demeanor of the witnesses). However, in appropriate circumstances, the Board may substitute its judgement for that administrative judge concerning the credibility of witnesses. Id. at 1330. When documents or objective evidence contradict the witness' story or when the story itself is so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it, the reviewing authority may find clear error in the purported credibility determination. Cf. Anderson v. City of Bessemer City, N.C, 105 S. Ct 1504, 1512-13 (1985), Hagemeyer v.

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Department of the Treasury, 757 F.2d 1281, 1284(Fed.Cir. 1985); Weaver v. Department of the Navy, 2 M.S.P.R. 129 (1980), aff'd 669 F.2d 613 (9thCir. 1982).

The appellant alleged contradictions in the Applicant I's testimony concerning whether she knew that the appellant had given her the telephone number of a motel. Further, he alleged inconsistenceies in her testimony concerning the date of his first telephone call to her after the interview. The appellant also cited hestitions in the Applicant I's testimony and described her tone as "argumentative." Further, the appellant cited photographs, which he had taken of the interview location, as contradictory documentary evidence.

Having reviewed the hearing tapes, the case file, and the hearing exhibits, we find that, with the exception of his arguments concerning the telephone calls on November 21 and 25, 1985, the record supports the administrative judge's findings and the agency's charge against the

appellant with respect to Applicant I. Furthermore, the appellant admitted that he: (1) Gave the Applicant I his business card with the agency's internal telephone number(sic - it was not an "internal" number); (2) gave Applicant I his hours and days of work and the telephone number of his non-agency employer; (3) called Applicant I, even though the call was not completed, after normal business hours; and (4) breached agency policy for dealing with claimants by encouraging Applicant I to believe that he was the sole contact for her claim. We find that this conduct admitted by the appellant lends support to Applicant's version of the events and, therefore, to the administrative judge's credibility findings.

The appellant misstates the evidence when he claims that Applicant I contradicted herself with regard to whether she knew at the time of the interview that the

telephone number he dictated to her was the telephone number of a motel. Applicant I's testimony establishes that, during her interview with the appellant on November 21, 1985, he dictated the telephone number and his hours of work to her to write on the back of his business card. After she had written the information, the appellant told her that it was the telephone number of the motel at which he worked. Although Applicant I knew it was a telephone number of a motel, she did not know the motel's name and address until several days after the interview when her ex-husband called the number supplied by the appellant. Hearing tape 2, Counter (hereafter "Ctr.") 560 to the end; Hearing tape 3, Ctr. 00-6-.

Concerning the telephone calls, Applicant I admitted that she was not sure if the appellant called and propositioned her on Thursday night(November21) or Friday(November 22). Hearing Tape 1, Ctr.350. The appellant produced the telephone bill from the motel to show that no long dis-

tance call had been made to Applicant I from that number on November 21, 1985. Appellant's Exhibit 5. However, the appellant testified that he initiated a call from the motel to Applicant I late in the night on November 21st but then terminated the call before it was answered. Hearing Tape 10, Ctr. 157-204. The appellant also testified that when he called Applicant I on November 22nd, he told her about trying to call her the night before. Hearing Tape 10, Ctr. 205-13. Under these circumstances, we find that Applicant's confusion about the date of the first completed call is not a significant factor which would place her credibility in doubt with respect to the substance of her first conversation after their interview.

Concerning the telephone calls on November 25, 1985, neither Applicant I's nor her social worker's testimony support the administrative judge's finding that the social worker was present when the calls were made. Applicant I testified

that the appellant did not make any advances to her during these conversations, but stated that he wished to speak to her on agency business. Applicant I refused to speak to him both times. Hearing Tape 1, Ctr. 389-410, Applicant I's testimony is consistent with that of the appellant and his coworker who testified that he was present when the appellant made the calls on November 25, 1989, and only heard the appellant attempt to discuss agency business. Hearing Tape 7, Ctr. 535-72. Accordingly, the preponderance of the evidence does not support the the portion of the agency's charge which alleged that the appellant again propositioned Applicant I in telephone calls on November, 1989.

Although the appellant contends that his documentary evidence, forms to be completed during an interview and his pictures of the interview location, establish the impossibility of Applicant I's allegation,

we find that they is not. The appellant's testimony establishes that his interview lasted for over one hour, Applicant I testified that the appellant had his hand on her leg for approximately fifteen to twenty minutes until he had moved it so high up her leg that she concluded that he had not intended it as a reassuring gesture and she took his hand away. Hearing Tape 1, Otr. 157-60; Hearing Tape 2, Otr. 280-320. Although the appellant testified that he was interrupted during his interview with Applicant I, he could not specify who interrupted ther or when it occurred. Hearing Tape 10, Otr. 144. It is therfore possible that the interruption occurred during the period of the interview in which he was not touching Applicant I. The photographs of the interview site were not taken at the time of the interview with Applicant I, and the chairs are not fixed to the floor. Contrary to the appellant's assertion, the photographs do not establish the impossibility of an inter-

viewer touching the leg of an applicant. Although such conduct could be visible to the other interviewer if he deliberately looked over to watch the appellant, the other interviewer, while conducting his interview, would not have the appellant's hand in plain sight.

In summary, we find that the preponderance of the evidence establishes that the appellant placed his hand on the Applicant's right knee during his interview with her and then moved his up her leg to her thigh. We also find that the appellant invited Applicant I to meet him at the motel at which he was night clerk and gave her its telephone number and his work schedule. Further, we find that the appellant repeated his invitation to Applicant I to meet him at the motel during his telephone conversation with her on November 22, 1985. The remainder of the agency's charge is not sustained.

2. The appellant's sustained misconduct is conduct adversely affecting public confi-

dence in the integrity of the government, and, therefore, it is unnecessary to determine whether such misconduct also constitutes sexual harassment.

The administrative judge relied on the decision of the United States Supreme Court in Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399(1986), in finding that the appellant's conduct toward Applicant I created an intimidating, hostile, or offensive environment which consituted sexual harassment. Initial Decision (I.D.) at 18. Although Meritor applied to conduct between coworkers, the administrative judge found that it applied in the instant case because, in order to receive her disability benefits, Applicant I, had to operate within the appellant's work environment.3/

3We note that the general statutory and regulatory prohibition of sexual harassment pertains to conduct explicitly or implicitly affecting an individual's "terms" or "conditions" of employment or which unreasonably interferes with an individual's work performance or which creates an intimidating, hostile, or offensive working environment.

However, we find that it is not necessary to determine whether sexual harassment extends to situations in which the alleged victim is not an employee because the agency also charged that the appellant's misconduct violated 45 C.F.R. § 73.735-508(f) which states:

> Employees shall avoid any action whether or not specifically prohibited by this part, which might result in or create the appearance of;...(f) Affecting adversely the confidence of the public in the integrity of the Government.

As stated previously, after Applicant I told her social worker of the appellant's conduct, the social worker discussed the situation with her supervisor and the Associate Director for Social Work at Hillside Hospital, Long Island Jewish Medical Center. The Associate Director then made the complaint to the appellant's supervisor. Accordingly, the appellant's misconduct toward Applicant I was known in the health care community with which the appellant had to work(sic-this contradicts the assignments as shown in the per-

formance discussions evidenced by the appellant, and the service area of the Colville,N.Y. District Office- How could I impded service to a facility I never visited?) and consequently harmed the agency's reputation.

3. The agency did not commit harmful error by relying on the appellant's prior reprimand for allegedly similar misconduct.

In his petition for review, the appellant alleges that the agency improperly relied on a prior reprimand which was more than one year old and, under collective bargaining agreement, could not be used against the appellant by the agency. The appellant has the burden of proving, by the preponderance of evidence, that the agency's reference to the prior reprimand was error in the application of its procedures which, based upon the record as a whole, caused substantial harm or prejudice to his rights, which in the absence of a cure might have caused the agency to reach a different conclusion. 5 C.F.R. 3

1201.56(c)(3).

The proposal to suspend the appellant states that his prior reprimand for similar misconduct was "noted." Agency File, Tab 4 at 2. Contrary to the appellant's statement of the proposal to suspend him in the petition for review, the reference to the prior reprimand was not included as a basis for the proposal, nor was it cited as a factor in the determination of the appropriate penalty for the appellant's misconduct.

As claimed by the appellant, Mr. Alex Rumney, the deciding official, testified on direct examination that he considered the prior reprimand. Hearing Tape 6, Ctr. 270. However, on cross-examination, Mr. Rumney testified that he was aware of the appellant's prior reprimand when it occurred and that it was expunged from the appellant's personnel record after one year. (See what about the erroneous document he had in the agency's Exhibits which Mrs. Marie Laran established as false?)

Mr. Bussey testified further that the appellant's representative was incorrect in characterizing Mr. Bussey's earlier testimony as a statement that he had used the prior reprimand against the appellant in this case. Mr. Bussey testified that although aware of the reprimand he tried not to let it influence him. (sic- The Board erred by not including the next phrasing in substance "...but we are not infallible!") Hearing Tape 7, Ctr. 165-77 The administrative judge found Mr. Bussey's testimony credible. I.D. at 16.

We find that although the agency may have erred in referring to the prior reprimand in its proposal, the appellant has failed to show that he was harmed by the error. The uncontradicted testimony of Mr. bussey that he was aware of the reprimand when it occurred, (sic- agency exhibits included Mr. Bernzweig's "recollections" which were contradicted by Mrs Baran's testimony, and like Mr. Bussey her testimony was uncontested!) but purposely tried

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not to consider it in rendering his decision on the appellant's proposed suspension, eliminates any harm in its mere mention; (sic-Once something is seen in written format and read how do you erase the errors it contains?); in the proposal to suspend the appellant.

Further, as discussed below, the penalty of a forty-day suspension is reasonable for the appellant's misconduct toward the Applicant I alone, and therefore, the appellant has not established by preponderant evidence that the agency used the prior reprimand to enhance the penalty imposed.4/

4. The penalty of forty-day suspension was reasonable under the circumstances of this case.

4/Because we have found that the agency did not rely on the appellant's prior reprimand and we do not ourselves rely upon it, the appellant's evidence concerning the substance of the reprimand is irrelevant.

In evaluating the appropriateness of the penalty imposed, the administrative judge erred in failing to consider that the portion of the agency's charge pertaining to Applicant II was not sustained. See Martinez v. Department of Agriculture, 22 M.S.P.R. 365, 367 (1984); Douglas v. VeTerans Administration, 5 M.S.P.R. 280, 301 (1981). We note further that not all of the specifications of the agency's charge with regard to Applicant I(sic) were proved by preponderant evidence. We shall therefore consider whether the forty-day suspension imposed by the agency is within the bounds of reasonableness for the appellant's conduct, namely, fondling Applicant I during her interview for SSI benefits, requesting her (during the interview) to meet him at a motel, and calling her at home on one occassion in which he repeated his suggestion that they meet at the motel.

We find the appellant's conduct toward Applicant I was serious, intentional, and closely related to his duties. His position required him to deal with the public 5/ and his offence occurred as a result of his public contact. Ms. Gloria Grossi, the appellant's supervisor, testified that the appellant's conduct was improper and unprofessional, and it created a with a major client institution of the agency. Hearing Tape 5, Ctr. 21-35. Ms. Grossi further testified that she concentrated on the conduct which the appellant had admitted in determining that his behavior toward Applicant I was improper and that his conduct was a factor affecting field representative performance. Hearing Tape 5, Ctr. 325-55. Mr. Bussey testified that the appellant's conduct was bad for the claimant, the agency's image, and for the management officials. Hearing Tape 6, Ctr. 528. Accordingly, we find the appellant's conduct affected the confidence of his supervisors in his ability to perform the duties of

his position. Futther, the record establishes that the appellant's offence had an adverse impact upon the agency's reputation. We find that these factors outweigh the appellant's evidence of good character and his previous disciplinary and employment records. We therefore conclude that the forty-day suspension did not exceed the maximum reasonable penalty for the proved misconduct by the appellant.

ORDER

Accordingly, the initial decision is AFFIRMED as Modified, and the appellant's suspension is SUSTAINED. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W. Washington, D.C.

20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD: (signature)
ROBERT E. TAYLOR
Clerk for the Board

Washington, D.C.